No. 91-1516

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

ANNE G. STUART, ET AL.,
PETITIONERS,

v.

FRANCIS M. ROACHE, AS HE IS
POLICE COMMISSIONER OF THE CITY OF BOSTON, ET AL.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED.

Whether a Consent Decree which disclaims any findings as to the existence of prior discrimination based upon the disputed allegations of statistical disparity presented in the original complaint and which requires the promotion of black police officers, over more qualified white officers, meets the strict constitutional standards required by the rule of City of Richmond v. J.A. Croson and Co., 488 U.S. 469 (1988)?

LIST OF PARTIES

The parties to the proceedings below and petitioners on this action are Anne G. Stuart, Robert J. Albano, Francis Armstrong, Mark V. Colemna, James M. Cook, Richard G. Daley, Peter N. Doherty, Daniel J. Dovidio, Robert J. Duggan, John Fitzgerald, Thomas J. Higgins, Robert J. Johnson, John P. Kelly, Thomas F. Lee, George P. Lotti, Arthur M. McCarthy, Robert F. McCarthy, Joseph K. McNiff, Dennis J. Murphy, Paul J., Murphy, John Necco III, John T. Pels, Walter Reed Jr., Dennis J. Ross, William E. Tracy, Paul E. Walsh, George P. Foley, and the respondents are Francis M. Roache, Police Commissioner of the city of Boston, David P. Haley, Personnel Administrator for the Department of Personnel administration and Raymond L. Flynn, Mayor of the City of Boston and the City of Boston.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANNE G. STUART, et al, Petitioners

v.

FRANCIS M. ROACHE, As He is Police Commissioner, of the City of Boston, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPINIONS BELOW.

The opinion below is reported at 951 F.2d 446 (1991). (App A). The opinion of the district court is not reported. (App B).

JURISDICTION

The decision below entered on December 23, 1991. This petition for a writ of certiorari is filed within ninety (90) days

as prescribed by law. 28 U.S.C. § 2102 (c). The jurisdiction of this court is claimed under 28 U.S.C § 1254 (1).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, Section I. . . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The petitioners are twenty-seven white Boston Police Officers who, since 1988 have been certified as eligible for promotion to the rank of sergeant, but have been passed over and not appointed to the rank of sergeant because since December 31, 1985, promotions have been made in accordance with a Consent Decree entered into by parties in

the case of Massachusetts Association of Afro-American Police Inc., et al. v. The Boston Police Department[1] (App. C)

In accordance with the Consent Decree the Commissioner of Police promotes blacks with lower scores on the qualifying examination and lower ranking on the eligibility lists over higher qualified whites.

A. Prior Proceedings: The Consent Decree.

On March 2, 1978 the Massachusetts Association of Afro-American Police, Inc. (MAAAP) filed a class action complaint alleging race discrimination by the Boston Police Department in promotions to the rank of sergeant. On September 16, 1980 a Consent

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[1]Plaintiffs were not parties to the initial consent decree.

Decree was approved by the Court (App. C). The Consent Decree, by its terms, required that the defendant grant a preference to black persons in making promotions to the position of Sergeant and provided certain goals and timetables and limited the number of promotions from the then-existing eligibility list to 25 officers (Consent Decree at 6; App. 79). The decree also provided that promotional tests were to be validated in accordance with the Uniform Guidelines on Employee Selection Procedures; 29 C.F.R. § 1607 et seq. and for the Police Department to provide all eligible applicants the opportunity for training for promotional tests and to give at least sixty days advance notice of promotional exams. (Consent Decree at 7; App. 80).

Specifically, the Decree at 4 (App. 77) states:

> "It now appears to the court that all parties have waived hearings, findings of fact, and conclusions of law and have agreed to the entry of this Decree. The consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI, 42 U.S.C. Sec. 1981, 1983, and 1988; Mass. Gen. Laws c.31, Sec. 10, Mass. Gen. Laws c.151 B; or Article I, Part the First, Constitution of Massachusetts; nor shall it be construed as an admission by the defendants to any matters in the complaint filed in this action. To the extent that this action involved allegations of employment discrimination in promotion other than to the rank of sergeant, assignment, training, discipline, treatment, and other terms and conditions of employment such allegations are not resolved herein, nor are they intended to be, and they are in effect being voluntarily dismissed without any prejudice whatsoever."

The decree was to remain in effect for five

years unless any party moved for its continuation on the grounds that its objectives had not been fully achieved.

On October 31, 1985, the decree was extended until September 16, 1990. The basis for the extension was that the goal of twenty-five (25) black sergeants by 1985 had not been met. As extended the Consent Decree required that new goals and timetables be prepared and submitted to the Court.

In 1989, following this Court's decision Martin v. Wilkes, 490 U.S. 755 (1989) petitioners, who were not parties to the prior consent decree, filed the instant suit challenging, as discriminatory, promotion decisions made pursuant to the MAAAP consent decree.

On September 19, 1990, over the objection of the plaintiffs in the instant

case, the Court again extended the MAAAP Consent Decree and allowed modification of the goals and timetables which now set at 40 the number of black permanent sergeants. As represented by

MAAAP, 27 black officers now held permanent sergeant positions at that time.

On June 5, 1990, defendant David Haley, Personnel Administrator at the request of defendant Roache, issued a notice that the 1988 sergeants eligibility list was being revoked, effective that day.[2]

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[2]The 1988 list included 232 police officers. Eighty three promotions were made from the list: 67 white officers and 16 minority officers. Two officers are deceased. One hundred and forty-seven officers remained on the 1988 list: 139 white officers and 8 minority officers. Twenty-nine of the plaintiffs in the instant case were certified eligible for promotions on the 1988 list. (Complaint, paragraphs 88-116).

The reasons for revocation were that use of the list would conflict with the consent decree, and that the list constituted a public emergency. The petitioners herein sought to enjoin revocation on the ground that promotional decisions of the Police Commissioner taken pursuant to the Consent Decree constituted impermissible racial discrimination and that defendant Haley had exceeded his authority under M.G.L. c. 31 § 25. After granting a temporary restraining order, the court denied the motion for preliminary injunction.

The District Court denied plaintiffs motion for summary judgment and granted defendants' motions for summary judgment. (App. 220).

The Court of Appeals for the First Circuit affirmed, stating: "We conclude the

Croson has not radically changed applicable preexisting law and that the Consent Decree remains legally valid" Stuart v. Roache, 447 F.2d 446, 447 (1st Cir. 1991).

REASONS FOR GRANTING THE WRIT.

Introduction

A basic principle embodied in the Fourteenth Amendment is that "our constitution is color-blind, and neither knows nor tolerates classes among citizens," Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

In City of Richmond v. J.A. Croson, Co. 488 U.S, 469 (1989), the majority of this Court took a significant step in re-affirming this principle. The majority and concurring opinions indicated that so-called affirmative action plans adopted by state or municipal entities based upon racial classifications

would be viewed critically, with no presumptive validity. Plans requiring race-based quotas would be subject to strict scrutiny; that past discrimination must be identified and that any remedial action must be narrowly tailored.

The court below, however, finds that a race-conscious program meets constitutional muster simply on the basis of a disputed statistical imbalance in the number of blacks holding sergeant positions. This is not in accord with the holding in Croson. Moreover, the Consent Decree specifically eschewed any findings of the issue of past discrimination. However, the court below in direct contravention of this court's teachings on the proper construction to be accorded a consent decree re-litigates the issue.

Even were this action permissible, only statistical imbalance has been demonstrated. There is no evidence that the testing procedure was applied in a discriminatory fashion and no evidence that any particular black officer was passed over for promotion based on race. To the contrary, it is undisputed that the twenty-seven petitioners were in fact passed-over for promotion solely because of their race. The Constitution does not permit racial preferences. Croson does not permit this type of racial preference. Therefore, certiorari should be granted so that the various circuit courts of appeal will give full effect to Croson.

I. THE FIRST CIRCUIT'S ANALYSIS OF THE CONSENT DECREE IGNORES BASIC PRINCIPALS UNDERLYING CONSENT DECREES IN A MANNER INCONSISTENT WITH DECISIONS OF THIS COURT.

In an effort to avoid the impact of City of Richmond v. Croson the First Circuit has re-litigated the factual contentions which were specifically waived by entry of the Consent Decree and has done so in the absence of any motions to modify the decree. The Decree does not merely contain a disclaimer of liability.[3] Rather, in the initial complaint MAAAP offered certain statistics intended to demonstrate an imbalance between the number of black sergeants.

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[3]The circuit decisions upon which the court relied are not "roughly comparable." Donaghy v. City of Omaha, 93 F. 2d 1448 (8th Cir. 1991) (disclaimer of liability and City never denied accuracy of statistics); Howard v. McLucas, 871 F.2d 1000 (11th Cir.), cert. denied 465 U.S. 1005 (1984) (disclaimer of liability only). Kirkland v. New York State Dept. of Correctional Servs., 711 F.2d 1117 (2nd Cir. 1983), cert. denied 1005 (1984) (disclaimer of unlawfulness).

The Boston Police Department, in answer to the complaint, did dispute the statistics alleged by the plaintiffs.[4] The disclaimer

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[4]As defenses, the Police Department asserted:

Third Defense

"The pleadings of the plaintiff are insufficient to establish a prima facie case because the statistical sample is too small to be significient, and because the allegations of the complaint fail to account for the Boston Police Department's complying with the requirements of its affirmative action program relating to sworn personnel."

Fourth Defense

The promotional examinations used by the Department since 1971 have not only been prepared by experts but are culturally unbiased and job related.

Fifth Defense

The statistical allegations set forth in the plaintiffs complaint fail to establish a prima facie case of racial discrim-

in the Decree is not merely of liability but specifically constitutes a waver of "findings of fact", "findings on merits" and "shall not be construed as an admission by the defendants to any of the matters in the complaint."

Yet the Court of Appeals dismisses the disclaimer and proceeds not only to make factual findings, but to go outside the "four corners" of the decree to rely on a decision in an unrelated case. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (discrimination in hiring practices).

The lower court's retroactive unilateral modification of the consent decree to provide a finding of prior discrimination in order to uphold the decree in light of Croson is in

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ination (App. 207-208).

direct conflict with a decision of this Court. In Firefighters v. Stotts, 467 U.S. 561 (1984), this court re-iterated the proper rule for construing consent decrees

> the .... 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation' United States v. Armour Co., 402 U.S. 673, 681-682.

Stotts at 574

In holding that a District Court's modification of a Consent Decree was improper, the Court looked to the actual findings contained in the decree

> "Here , there was no finding that any of the blacks protected from layoffs had been a victim of discrimination and no award of competitive seniority to any of them."

Stotts at 499

Justice Stevens, concurring at 591, specifically noted that it was the consent decree itself which governed the case, in particular the disapproval of any finding of a violation of Title VII.

> 'If the decree had been predicated on a finding that the city had violated Title VII, the remedial policies underlying that Act might be relevant, at least as an aid to construction of the decree. But since the settlement expressly disallowed any such finding, the Court's exposition of Title VII is unnecessary'.

Stotts at 591, n.4.

The consent decree is a final judgment binding upon those who had notice and opportunity to object. Id. It is submitted that neither the parties, nor the Court can now read out of the consent decree what is no longer agreeable to them, or read into it what might have been written had the

plaintiffs established their factual claims in litigation. As this court stated in United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n.9, even where one interpretation might better effectuate the purpose of the decree this "does not warrant our substantially changing the terms of a decree to which parties consented without any adjudication of the issues."

Most recently in a case involving the standard to be applied in permitting modification of a consent decree, pursuant to Fed R. Civ. Pro 60 (b), this court focused on the specific terms of the decree itself. Rufo v. Inmates of Suffolk County Jail, __ U.S. __, (1992), Slip Opinion at 21.

Therefore, it is submitted that the lower court's re-construction of the Consent Decree is legally improper and in direct

conflict with decisions of this court as to the proper weight to be given to the terms of a Consent Decree.

II. THE DECISION BELOW FAILS TO GIVE FULL EFFECT TO CITY OF RICHMOND V. J.A. CROSON, CO.

Croson it is submitted, significantly limited the availability of racial quotas and preferences. Croson holds that the equal protection clause forbids states and municipalities to discriminate in favor of blacks unless the discrimination is necessary to rectify prior invidious discrimination. Racial discrimination in any form is unconstitutional unless its purpose is to provide a remedy for identified discrimination. A majority of the court held that all racial classifications must pass

"strict scrutiny" and be justified by a compelling governmental purpose. The majority did require that identified discriminatory practices be demonstrated in order to justify racial preference. After rejecting the City's proferred justification based on past industry-wide discrimination, general societal discrimination and statistical disparities,. Justice O'Connor, for the Court, concluded:

> "There is nothing approaching a constitutional or statutory violation by anyone in the Richmond Construction Industry.
>
> ...Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." 488 U.S. at 500 (emphasis supplied)

Past discrimination must be identified and a casual connection established. In

Wards Cove Packing Co v. Atonio, 490 U.S. 642 (1989) the majority of this court made clear, in a Title VII case, that statistical disparity is not sufficient to state a prima facie case. It must be demonstrated that specific employment practices have been identified and a casual connection established between those practices and the exclusion of a minority. Ward 490 U.S. at 656-657.

At best, plaintiffs in the original MAAAP case have presented statistics that, if correct, demonstrated a "bottom line" racial imbalance in the work force. Merely because a disparity exists sufficient to "cast doubt on the promotional process," (Stuart v. Roache 951, F.2d 446, 451) this is not a sufficient showing to demonstrate a compelling government interest justifying the

use of racial quotas.

While the court below acknowledged that "strict scrutiny" was the standard,to be applied they did not in fact apply it. Aside from the statistics submitted, there is no evidence of, or finding that promotional tests were on their face discriminatory or administered in a discriminatory manner or had discriminatory impact. The Consent Decree merely requires that the department not use tests unless they are validated or are "otherwise shown to have no discriminatory impact." (Consent Decree, App. 80) There is no finding in the decree that the Department had used non-validated tests or that the tests had a discriminatory impact.

The Court below turns the thrust of Croson on its head, instead of viewing a race

based affirmative action plan as "highly suspect tool" it upholds the plan simply because a statistical disparity "casts doubt on the fairness of the promotion process." Stuart at 451.

The Court below also fails to give full effect to the second prong of Croson, i.e. that any race-based remedy be "narrowly tailored to the achievement of that gaol." In Croson, the determining factor was the failure of the plan to consider whether any alternatives to a race-based quota" had been considered. Here, too, it is suggested, that a race-neutral educational plan in addition to validated race-neutral testing for promotions would have sufficiently rectified any past failure in promotional policies.

Moreover, the Decree can hardly be deemed narrowly tailored where it has been in

existence for 12 years. The original "goal" was 25 black sergeants by 1985. At the time of the most recent modification and extension, 27 black sergeants held permanent positions. The new goal now requires 40 black permanent sergeants in 1991. Contrary to the view of the court below, the decree is self-perpetuation and self-modifying as the number of black officers in the labor pool increase. The plan has become in fact a plan "intended to maintain racial balance." United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979). As such it contravenes the rule of Croson.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1483

ANNE G. STUART, ET AL.,
Plaintiffs, Appellants,

v.

FRANCIS M. ROACHE, AS HE IS POLICE COMMISSIONER OF THE CITY OF BOSTON, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, U.S. District Judge]

Before

Breyer, Chief Judge,
Aldrich, Senior Circuit Judge,
and Selya, Circuit Judge.

Barbara A.H. Smith, with whom Regina L. Quinlan and Quinlan & Smith were on brief for appellants.

Jonathan M. Albano with whom Marianne C. Delpo, Bingham, Dana & Gould, Alan J. Rom, and Lawyers Committee for Civil Rights Under the Law of the Boston Bar Association were on brief for appellee, Massachusetts Association of Minority Law Enforcement Officers.

William W. Porter, Assistant Attorney General, with whom Scott Harshbarger, Attorney General, and Eleanor Coe, Assistant Attorney General, were on brief for appellee, Massachusetts Personnel Administrator.

December 23, 1991

BREYER, Chief Judge. For the past eleven years the Boston Police Department, when promoting officers to the position of sergeant, has followed terms of a Consent Decree that require it to favor minority officers solely because of their race. The basic question on this appeal is whether, in light of a recent Supreme Court case, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), those consent Decree terms remain legally binding. We conclude that Croson has not radically changed applicable preexisting law and that the consent decree remains legally valid.

I

Background

State law has long required the Boston Police Department (Department) to follow a two-step process in promoting officers to the

position of sergeant. First, officers who have served for three years may take a promotional examination. Those who pass the exam are placed on a promotion list, where they are ranked according to score. Mass. Gen. L. ch. 31 (25. Second, the promoting official, the Police Commissioner, fills sergeant vacancies from this list of eligible officers, roughly according to rank order. To be more specific, the Commissioner follows a rule of "2n + 1," a rule that means that, if there are five sergeant vacancies (n = 5), the Commissioner fills them from the top 11 persons on the list ((2 x 5) + 1); if there are 15 vacancies, the Commissioner fills them from the top 31 persons on the list, and so forth. Mass. Gen. L. ch. 31 (27; Personnel Administration Rule 9 (1988); Haley Aff. at 3.

In 1978 the Massachusetts Association of Afro-American Police, Inc. (MAAAP) sued the Boston Police Department claiming that Step One of its promotion system -- the testing procedure -- was biased against black officers. It argued that the tests, along with previous discrimination at the entry level, had created a virtually all-white cadre of sergeants. cf. Castro v. Beecher, 334 F. Supp 930 (D. Mass. 1971), aff'd in part and rev'd in part, 459 F.2d 725 (1st Cir. 1972) (finding that entry-level Police Department testing unlawfully discriminated against black applicants). The result of this discrimination, MAAAP said, was a Department where, in 1978, only one (or .45 percent) of 222 sergeants was black, although blacks comprised 5.5 percent of the roughly 2200 police officers in the force and 20

percent of the population of Boston as a whole.

In 1980, MAAAP and the Department settled their lawsuit. They entered into a consent Decree in which (among other things) the Department promised to use only promotional tests specially validated as anti-discriminatory and fair. The Decree also says that police "Commissioner shall make appointments to overcome any under utilization [of minorities] that may exist among sergeants in accordance with the goals set forth in Appendix B." Appendix B contains a Table entitled "Goals and Timetables." The Table sets forth a list (year by year) of the "projected number of sergeants," the "projected number of positions to be filled," and a set of related "goals" for the number of black sergeants in

the Department. These goals, if achieved, would have meant 25 black sergeants by the year 1985, creating a Department with about 9 percent black sergeants. See Consent Decree, Appendix B. The Appendix also states that "the Department is to make good faith effort to reach these goals." The Decree, by its terms, was to expire in 1985.

During the Decree's initial life -- between 1980 and 1985 -- the Department failed to give any "validated -fair" examinations, and it failed to meet the Consent Decree's numerical goals. As a result, MAAAP successfully petitioned the court to extend the Decree's life until 1990 and to modify its "Goals and Timetables" to reflect the increasing number of qualified blacks in the Department. Between 1985 and 1990, the Department successfully

administered one "validated-fair" examination. The number of blacks promoted during this time, however, still fell short of the Decree's numerical goals. Thus, in 1990, at MAAAP's and the Department joint request, the court extended the Decree once more, until the Department gave one additional "validated-fair" examination -- an examination that the Department had scheduled for later this year. Since the parties expected that, by December 1991, nearly 20 percent of promotion-eligible officers would be black, the court revised the Decree's numerical goal to 40, or 15.5 percent, of the Department's sergeants.

In October 1990, thirty-four white police officer plaintiffs filed this action against the Boston Police Department. The white plaintiffs complain, and the Department

concedes, that the Commissioner did not appoint them to the rank of sergeant, that the scores of at least some of the promoted black officers placed those black officers below the ("2n + 1") civil service rule cut-off point that would have prevented their appointment in the absence of the Consent Decree, and that (in the Commissioner's words) the white plaintiffs "were all passed over because of . . . compliance with the consent decree." Roache Dep. at 25. The plaintiffs argue that the law clearly would prohibit this type of "race-conscious" promotion in the absence of the Consent Decree. And, they add that, in light of Croson, the Decree is powerless to authorize or to require such discrimination.

The district court, after reviewing past and present Supreme Court opinions in this

area, concluded that the Decree is lawful and may compel this kind of race-conscious activity as a remedial measure, correcting prior anti-black discrimination. The plaintiffs have appealed, asking us to re-examine the legality of the Decree in light of the Croson decision.

II

The Legality of the Decree

The Consent Decree at issue classifies police officers according to race. It provides benefits based upon race. The Supreme court has made it clear that any court, in deciding whether such a classification is lawful, must subject it to "strict scrutiny." See Croson, 488 U.S. at 494 (plurality of four Justices) ("reaffirm[ing] the view expressed by the plurality in Wygant that the standard of

review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification"); id. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("accept[ing] . . . . rule contained in Justice O'Connor's opinion"); id. at 520 (Scalia, J., concurring in the judgment) ("agree[ing] . . . that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279 - 80 (1986) (plurality); id. at 285-86 (O'Connor, J., concurring in part and concurring in the judgment).

Although different members of the Court have described differently what they believe "strict scrutiny" means, see Croson, 488 U.S.

at 518-19 (Kennedy, J., concurring in part and concurring the judgment) (contrasting strict scrutiny standard of plurality with that of Justice Scalia), we believe a majority of the Court has concluded that the standard requires us to make certain that any race-conscious relief is justified by a "compelling state interest," see, e.g., id. at 505, and that any such relief is "narrowly tailored" to further that interest. Id. at 507-08. See also United States v. Paradise, 408 U.S. 149, 167 (1987) (plurality) (setting out both parts of strict scrutiny test); Wygant 476 U.S. at 274 (plurality) (same); id. at 285 (O'Connor, J., concurring in part and concurring in the judgment) (same). The Court also accepted an equally important proposition, mainly that a compelling state interest "unquestionable" exists where a

race-conscious employment program "remed[ies] past and present discrimination by a state actor." Paradise, 480 U.S. at 167 (plurality). See also Wygant, 476 U.S. at 274 (plurality) (to justify racial classification, need "showing of prior discrimination by the government unit involved"). In light of these propositions, the race-conscious relief before us lawful if it represents a "narrowly tailored" effort to remedy past Police Department discrimination against minority groups.

A

Compelling Interest

As we read the relevant Supreme Court opinions, the basic question before us is an evidentiary issue: Is thee a "strong basis in evidence" for the conclusion that the Consent Decree here at issue serves a

remedial purpose with respect to past discrimination? Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277 (emphasis added). We recognize that, at one point, Justice Powell may have suggested a stronger evidentiary standard. In a will-known plurality opinion, he wrote that "judicial, legislative, or administrative findings of constitutional or statutory violations: may be necessary to trigger a governmental interest in remedying past discrimination. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (emphasis added). Justice Powell, however, later wrote in support of a less strict standard, authorizing race-conscious relief where the public entity had a "strong basis in evidence for [the] conclusion that remedial action was necessary." Wygant, 476 U.S. at 277

(plurality) (emphasis added). See also id. at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("agree[ing] with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite"). A majority of the Supreme Court in Croson used the words "strong basis" and "prima facie case" in this context. Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277 (plurality). See also Wygant, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). Hence, that is the evidentiary standard that we use.

In this case, the record provides "strong evidence" that the race-conscious relief in the Consent Decree serves a proper remedial purpose. For one thing, the Consent

Decree itself recites figures that would appear to make out a "prima facie" case of unlawful discrimination in the promotion of black officers. For example, the Decree points out that, at the time MAAAP filed its complaint (March 2, 1978), only one of 222 sergeants in the Boston Police Department was black, yet approximately 72 black officers were eligible for promotion. The relevant percentages -- 0.45 percent black sergeants in the Department with 4.5 percent eligible black police officers -- would seem to make out a prima facie case of discrimination under "disparate impact" analysis as applied by many courts. Cf. Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.14, 311 n.17 (1977); Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977); Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1406

(11th Cir. 1991). Undisputed figures in the complaint, describing 1970s tests and their results, would strengthen the case.

Plaintiffs contended that the statistical disparities in the Department cannot be sufficient to justify an affirmative action plan because the Supreme Court in Croson found that even greater disparities did not constitute "strong" or "firm" evidence of prior discrimination. Plaintiffs, however, misinterpret the Croson Court's rationale for dismissing the significance of the statistical evidence in that case.

In Croson, the Richmond City Council adopted a set-aside program that "required prim contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the

contract" to minority businesses. Croson, 488 U.S. at 477. The trial court found that the set-aside program was appropriate because, among other things, "minority businesses received .67 percent of their prime contracts from the city while minorities constituted 50 percent of the city's population." Id. at 499. The Supreme Court rejected this rationale. It did not do so, however, because the gross disparity suggested by the statistics was insufficiently large. Rather, the Court did so because of the way in which the Council had compared minority participation in the construction industry with general population figures. While acknowledging that "gross statistical disparities" may alone constitute prima facie proof of prior discrimination, id. at 501, the Court declared that "where

special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." Id. at 501-02 (emphasis added). The Court noted that "[i]n this case, the city does not even know how many [minority enterprises] in the relevant market are qualified to undertake prime or subcontracting work in public construction projects." Id. at 502. More generally, where special qualifications are relevant, a comparison to general population figures will not tend to show past discrimination by the specific governmental unit involved, for it may just as well reflect "past societal discrimination in education and economic opportunities . . . " Id.; Wygant, 476 U.S. at 276 (plurality);

Bakke, 438 U.S. at 307 (plurality).

In the present case, however, the "comparison" figures do not appear to reflect simply general "societal" discrimination. The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants. The fact that, of the later pool, 4.5 percent of the officers are black, as opposed to .45 percent who become sergeant, at least cast doubt on the fairness of the promotion process and requires further explanation. Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in judgment) (when the public employer "introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for

determining that [the employer] had a firm based for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the court that the . . . evidence did not support an inference of prior discrimination . . . . ").

Plaintiffs, in an effort to discredit these numbers, point out that the Department selects its police sergeants from among those officers who pass the sergeants' examination. They suggest that the pool of qualified applicants (against which the small number of black sergeants are measured) consequently should have been those who passed the examination, not those who took it. However, to treat the former group as the "pool of eligible," would assume that the examination

was a fair non-discriminatory device for screening applicants. And, it is just this assumption that the tiny percentage of black sergeants (measured against the larger percentage of eligible black examination-takers) calls into question. MAAAP, in its original complaint, charge that the examination itself discriminated unfairly, pointing out, for example, that pass rates for blacks who took the examination were, in 1974 and in 1977, 62 percent and 28 percent of pass rates for whites who took the examination.

The very purpose of "disparate impact" analysis is to use a numerical comparison that will help identify a possibly unfair, discriminatory hurdle interposed between the eligible minority applicant and success. Watson v. Fort Worth Bank & Trust, 487 U.S.

977, 987 (1988). To choose both "pool of eligible" and :successful applicants" from the far side of the hurdle would destroy the point of the analysis; and the law does not require courts to do so. See, e.g., Powers v. Alabama Dept. of Educ., 854 F.2d 1285, 1297 (11th Cir. 1988) ("By requiring that the plaintiffs [in disparate impact suit] limit their comparison pool to only those blacks who had been certified [for advancement], the district court simply begged the question."), cert. denied, 490 U.S. 1107 (1989).

Plaintiffs also argue that the pool of eligible officers should be made up of those who actually applied for promotion, not just those who were eligible on paper. They have presented no evidence, however, either here or in the district court, that doing so would make any significant difference. We have no

reason to believe that the percentage of eligible officers who would ask for promotion would differ by race. This unlike Croson, the numbers mentioned in the Decree make out a plausible prima facie case of unlawful discrimination.

For another thing, the Decree refers to Castro v. Beecher , 459 F.2d 725 (1st Cir. 1972), a litigated case that suggests a different, obvious, and perhaps more important reason why the Boston Police Department had only one black sergeant in 1978. In Castro, this court affirmed a lower court finding that the Department discriminated against black applicants in its hiring practices, through the use of entry-level testing procedures that improperly favored white applicants. The result, as of 1970, was a Police Department with just over

2 percent of its officers black or hispanic, in a city where these minority groups comprised 16 percent of the total population. Obviously, if few blacks become police officers, few blacks will become sergeants.

Castro required the Department to begin, in the early 1970s, to remedy this situation by instituting efforts to hire a greater number of black officers. Yet remedial action takes time, and discrimination may linger for many years in an organization that had excluded blacks from its ranks. As we have said, by the end of the 1970s, approximately 5.5 percent of the police force was black, but only 4.5 percent of those officers with three years of experience and 2.6 percent of those with seven years of service were black. The Consent Decree itself indicates that experience matters.

While an officer must have served three years in order to apply to become a sergeant, successful applicants have served an average of seven or more years in the police force.

One obvious reason, then, why there may have been few black sergeants in the Boston Police Force in 1978 is that the Department had not hired many black police officers before 1970. Since unjustified discrimination accounted for the latter fact, the latter fact cannot excuse the former. See Paradise, 480 U.S. at 168 (plurality) where "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions, and resulting in a departmental hierarchy dominated exclusively by non-minorities . . . . [the Department cannot] segregate the results achieved by its hiring practices and those achieved by its

promotional practices."). See also Powers, 854 F.2d at 1229 (relative inexperience of black employees will not rebut showing of disparate impact where it is "likely that racial discrimination was responsible for the difference in blacks' and 'whites' length of service"); Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.) (same), cert. denied, 429 U.S. 861 (1976); cf. Griggs v. Duke Power Co., 401 U.S. 424, 430, (1971); Oliver v. Digital Equip. Corp., 846 F.2d 103, 110, (1st Cir. 1988) ("employer can be placed under a higher burden . . . upon a showing of past discrimination . . . . "). Indeed, litigated court findings of recent entry-level discrimination would seem sufficient to justify race-conscious remedies at both entry and promotional levels. See, e.g., Higgins v. City of Vallejo, 823, F.2d 351 (9th Cir.

1987) (1982 affirmative action program supported by 1973 state agency finding of discrimination and racial imbalance in municipal workforce), cert. denied, 489 U.S. 1051 (1989); Fountain v. City of Waycross, 701 F. Supp. 1570, 1577 (S.D. Ga. 1988) (Statistical evidence unnecessary where direct and uncontroverted evidence that Department engaged in a pattern of discrimination against blacks 8 years ago).

In sum, if we look only to the Decree itself and an earlier litigated case, we find (1) numbers that make out a "disparate impact;" (2) a past history of entry-level discrimination; (3) allegations of unfair, discriminatory promotional examinations; and (4) no significant effort by the Department or the plaintiffs, here or earlier, to rebut the natural inference of discrimination

arising from the first three of these circumstances. These four factors provide a "strong" or "firm" basis in evidence of prior discrimination. And, that discrimination, in turn demonstrates a "compelling purpose" for race-based relief. Wygant, 476. U.S. at 277-78 (plurality); id. at 292-93 (O'Connor, J., concurring); Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277).

Plaintiffs, in a heroic effort to overcome the force of these considerations, argue that the Consent Decree itself forbids us to take account of some, or all, of them. The Decree contains a disclaimer of liability which states:

> The consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by the defendants of any violation . . . nor shall it be construed as an admission by the

> defendants to any of the matters in the complaint filed in this action.

Plaintiffs argue that this disclaimer precludes defendants from introducing, and the court from considering, at least statistical evidence of disparities found in the Decree.

However, that is not what the disclaimer says. The disclaimer simply precludes the Decree's use as an "admission" of liability, or as an "admission" of the facts and violations mentioned in the complaint. It does not say that it precludes litigation by others. It does not say that it applies to facts agreed to in the Decree itself. Nor does it say that the Department may not subsequently admit to the same facts for other purposes (which they have done in the case before us). Indeed, to read the

disclaimer more broadly, as permanently barring the parties from relying on the facts cited in the Decree, would effectively prevent the signatories from defending the Decree against third party challenges. Such an interpretation would conflict with the express wording of the Decree (requiring the parties to repel such challenges) and with the intent of the parties in adopting the remedial plan. It is not surprising that courts, in roughly comparable cases, have uniformly stated that a disclaimer will not bar the consideration of evidence of past discrimination introduced in the action. See generally, Donaghy v. City of Omaha, 933 F.2d 1448, 1460 (8th Cir. 1991); Howard v. McLucas, 871 F.2d 1000, 1008 (11th Cir.), cert. denied, 493 U.S. 1002 (1989); Kirkland v. New York State Dept. of Correctional

Servs., 711 F.2d 1117, 1131 n.16 (2nd Cir. 1983), cert. denied, 465 U.S. 1005 (1984); Stotts v. Memphis Fire Dept., 679 F.2d 541, 553 n.10 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); United States v. City of Alexandria, 614 F.2d 1358, 1364-65, 1365 n.15 (5th Cir. 1980); United States v. City of San Francisco, 656 F. Supp. 276, 285 n.9 (N.D. Cal. 1987); EEOC v. American Tel. & Tel. Co., 419 F. Supp. 1022, 1038 n.16 (E.D. Pa. 1976), aff'd, 556 F.2d (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). We con find no reason to depart from this authority.

Our reading of the disclaimer's effect, of course, does not prevent the parties in a reverse discrimination suit such as this one from offering additional evidence in support

of, or in opposition to, the specific facts mentioned in the Decree. But, the plaintiffs, when opposing the defendant's summary judgment motion did not point to any such evidence. Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). To the contrary, in their own motion for summary judgment, plaintiffs said "there is no genuine issue as to any material fact," and "rely," among other things, on the Consent Decree for support.

B

Narrow Tailoring

Any race-based remedy for prior discrimination must also be "narrowly tailored to the achievement of that goal." Wygant, 476 U.S. at 273-74 (quoting Fullilove

v. Klutznick, 448 U.S. 448, 480 (1980) (opinion of Burger, C.J.)). The following features of the relief at issue convince us that the relief ordered here meets this requirement.

First, the pool of minority officers benefitting from the relief is the qualified pool of those who have passed civil service examinations validated as fair and non-discriminatory. See Paradise, 480 U.S. at 177-78 (plurality) (appropriate relief where qualified applicants promoted and where Department not obligated to make unnecessary or gratuitous promotions).

Second, the Promotional goals contained in the Decree are linked to the size of the relevant qualified labor pool. See Paradise, 480 U.S. at 187 (Powell, J., concurring) (in determining whether remedy is narrowly

tailored, a court may examine "the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce"); id. at 199 (O'Connor J., dissenting). See also Croson, 488 U.S. at 507 (criticizing plans based on general population figures under second prong of strict scrutiny). Indeed, the goals fall short of the projected number of black officers eligible for promotion. For example, as projected, the 1991 goal for black sergeants amounts to 15.5 percent of all sergeants, while the eligible pool contains about 20 percent black officers.

Third, the Commissioner, in promoting from the list of those who have passed the examination, gives only limited advantage to minority officers, increasing the number of

black sergeants gradually over time. The Decree sets as its original "goal" the promotion of 5 blacks to sergeant out of projected 24 promotions available in 1981; the promotion of 7 blacks to sergeant out of a projected 35 promotions available in 1985; and so forth. The revised "Timetables and Goals," as entered by the district court in 1990, sets as a "goal" the promotion of 13 blacks to sergeant out of a projected 58 promotions available in 1991. Thus, the Decree limits only to a rather small extent the ability of white police officers to become sergeants. Indeed, white officers passed over on one test may be considered for future appointments. Compare Wygant, 476 U.S. at 283, with Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 (1987) ("[D]enial of the promotion

unsettled no legitimate, firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions."); Higgins, 823 F.2d at 360 ("Like hiring goals, promotion guidelines visit a minor burden on nonminority employees. But unlike hiring goals, promotion guidelines do not require that an individual bear the burden of past discrimination to the extent that he or she is denied a livelihood.").

Fourth, the Decree is limited in time and will likely terminate sometime next year. Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 479 (1986) (plurality) (remedial goals should be temporary);

Paradise, 480 U.S. at 178 (goals are ephemeral, contingent on Department's conduct); Fullilove v. klutznick, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (temporary nature ensures "that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate"). Plaintiffs point out that the Decree has been extended twice since its original expiration date in 1985, and it could be extended further. But strong reasons supported the extensions. As of 1985, the Department had failed to give the "validated-fair" examination called for by the Decree. By 1990, the Department had given only one such examination and had failed to meed the Decree's goals. IN 1990, the Department was planning for its second "validated-fair" examination in ten years, an

examination that was to take place in 1991. That fact, along with the changing racial composition of the police force, made a brief extension and somewhat revised goals appropriate, Cf. Sheet Metal Workers, 478 U.S. at 478 (plurality); id. at 487-8 (Powell, J., concurring in part and concurring in the judgment); Paradise, 480 U.S. at 178 & n.29 (plurality). The Decree "is not being used to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge . . . efforts to remedy past discrimination." Sheet Metal Workers, 478 U.S. at 477-78; Johnson, 480 U.S. at 639 (decree intended only to "attain a balance workforce, not to maintain one"); United Steelworkers v. Weber, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring).

Fifth, the Decree explains why alternative, racially-neutral relief alone would likely prove inadequate by describing how the Department's efforts in the 1970s failed to produce fair testing procedures or reduce the impact of seniority on promotion. See Paradise, 480 U.S. at 171 (plurality) ("in determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . efficacy of alternative remedies.")' Croson, 488 U.S. at 507; Wygant, 476 U.S. at 280 n.6 (plurality). The Consent Decree, as a result, included the minority training and education programs that the plaintiffs advocate, as well as the relief here now before us.

In sum, the race-conscious relief here at issue represents a narrowly tailored effort, limited in time, to overcome the

effects of past discrimination. As such, it is lawful. Paradise, 480 U.S. at 185-86 (plurality); Wygant, 476 U.S. at 274 (plurality). And, the efforts in favor of eligible black police officers that it mandates therefore do not violate any statute or the Constitution of the United States.

III

Other Arguments

The plaintiffs make tow additional legal claims. First, they argue that state law granted them a "property right" to a promotion; and that to deny them a promotion without a hearing deprives them of their "property, without due process of law." U.S. Const. amend. CIV [1. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Perry v. Sindermann, 408 U.S. 593, 601, (1972). We have previously held, however, that, where an

appointing authority may consider factors in addition to the applicants' ranking on an eligibility list, a police officer's expectation of promotion based on that list will not rise to the level of a "property interest" entitled to constitutional protection. Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir.) (police officer does not possess property right in promotion based on written examination scores), cert. denied, 449 U.S. 893 (1980). Cf. Callanan v. Personnel Adm'r for the Commonwealth, 400 Mass. 597, 601 (1987); McCue v. Director of Civil Service, 325 Mass. 605, 608 (1950). Since the eligible officers do not have a "property right" in promotions, the Fourteenth Amendment consequently does not offer them procedural protections. Roth, 408 U.S. at 578; Cleveland Bd. of Educ. v.

Loudermill, 470 U.S. 532, 538 (1985), Bishop v. Wood, 426 U.S. 341, 347 (1976).

Second, plaintiffs argue that the Commissioner's race-conscious promotion policy amounts to intentional racial discrimination and thereby violates 42 U.S.C. { 1981 (providing "equal rights under the law" for all persons within the United States). For the reasons set fourth in Section II of this opinion, however, we find that the race-based relief was justified by a compelling state interest and narrowly tailored to serve that interest. Since a valid remedial plan provides a legitimate nondiscriminatory basis for race-based employment decisions, plaintiffs' { 1981 claim must also fail. Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 976 (1st Cir. 1982) (race-conscious relief permissible under {

1981 and (1983, as well as Title VII), vacated on other grounds sub nom. Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983) (per curiam). See also Setser v. Novack Inc. Co., 657 F.2d 962, 966-67 (8th Cir. 1981) (en banc) (race-conscious plans to remedy past discrimination not barred by (1981) (citing cases); Edmonson v. United States Steel Corp., 659 f.2d 582, 584 (5th Cir. 1981). Cf. Johnson, 480 U.S. at 626-27 ("existence of an affirmative action plan provides [a nondiscriminatory] rationale" for race-conscious promotions and a valid defense to Title VII reverse discrimination claim); Paradise, 480 U.S. at 167 (plurality) (upholding race-conscious relief against Equal Protection challenge); Sheet Metal, 478 U.S. at 479-80 (plurality) (same).

For these reasons, the judgment of the district court is Affirmed.

Appendix

BOSTON POLICE DEPARTMENT

GOALS AND TIMETABLES: BOSTON POLICE SERGEANT

Date	Projected No. Of Sergeants	Projected No. Of Positions To Be Filled	Projection of Blacks As A Percentage Of Patrol Officers With 3 Years In Grade*	Projection of Blacks As A Percentage Of Patrol Officers With 7 Years In Grade**	GOALS	
					No. of Black Sergeants***	Blacks As A Percentage Of Sergeants
July 1980	228	25	4.4	2.6	3	1.3
Dec. 1981	242	24	7.1	3.4	8	3.2
Dec. 1982	270	35	7.0	4.6	13	4.8
Dec. 1983	270	30	12.6	4.4	18	6.7
Feb. 1985	270	35	14.6	6.9	25	9.2

* Three years in grade as a patrol officer is a requirement for promotion to sergeant.

** It has been the experience of the Department that those officers actually promoted to sergeant have had 7 years in grade as patrol officers.

*** Includes sergeants who serve in higher, non-Civil Service positions.

The figures in these Goals and Timetables do not reflect unanticipated attrition.

BOSTON POLICE DEPARTMENT

GOALS AND TIMETABLES: BOSTON POLICE SERGEANT

DATE	NO. OF SERGEANTS	NO. OF POSITIONS TO BE FILLED	BLACKS AS A PERCENTAGE OF PATROL OFFICERS WITH THREE YEARS EXPERIENCE	NO. OF BLACK SERGEANTS	BLACKS AS A PERCENTAGE OF SERGEANTS
September 1990	213 permanent plus 45 acting or provisional appointments	0	17.31 (or 210 black officers of a total of 1213)	27 permanent plus 8 acting or provisional appointments	12.68
				GOALS	
December 1991	200	58 (replace 45 provisional appointments and fill 13 retirement positions)	19.56 (or 284 black officers of a total of 1452)	40	15.50

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANNE. G. STUART, et al.

Plaintiffs

v.

CIVIL ACTION
NO. 89-2348-S

FRANCIS M. ROACHE, Police Commissioner of the City of Boston, DAVID A. HALEY, Personnel Administrator for the Department of Personnel Administration for the Commonwealth of Massachusetts, RAYMOND L. FLYNN, Mayor of the City of Boston, and the CITY OF BOSTON

Defendants

ROBERT T. GUINEY, President of the Boston Police Patrolmen's Association, Inc.

Plaintiff

v.

CIVIL ACTION
NO. 90-10113-S

FRANCIS M. ROACHE, Police Commissioner of the City of Boston, and DAVID A. HALEY, Personnel Administrator for the Department of Personnel Administration for the Commonwealth of Massachusetts,

Defendants

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGEMENT

April 12, 1991

SKINNER, D.J.

Plaintiffs in the Stuart, et al. v. Roache, et al. action are thirty-four Boston police officers who, since 1988, have been on an eligibility list for promotion to the rank of sergeant. Robert Guiney, the plaintiff in the Guiney v. Roache, et al. action is President of the Boston Police Patrolmen's Association, Inc., which represents Boston police officers below the rank of sergeant. In both actions the plaintiffs are white police officers claiming discrimination in promotions stemming from a consent decree approved by the court in Massachusetts Association of Afro-American Police, Inc., et

al. v. The Boston Police Department, et al., C.A. No 78-529-McN (D. Mass. Sept. 16, 1980). The plaintiffs allege that they have been passed over for promotions because since December 31, 1985, promotions to the rank of sergeant have been accordance with the consent decree. The plaintiffs assert that the promotion of blacks with lower scores on the qualifying examination and lower ranks on the eligibility list has violated the plaintiffs' rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983, the fifth amendment, and the equal protection clause of the fourteenth amendment. The plaintiffs challenge the constitutionality of the consent decree and certain promotions made pursuant to its terms. Motions for summary judgement have been filed by the plaintiffs, by all the defendants, and by defendant-intervenor

Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO").

Background

On March 2, 1978, the Massachusetts Association of Afro-American Police, Inc. ("MAAAP")[1] filed a class action complaint alleging race discrimination by the Boston Police Department in promotions to the rank of sergeant. The complaint alleged, among other things, violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., 42 U.S.C. § 1983. After more than two years of negotiations, the parties reached agreement on a proposed consent decree.

The consent decree was approved by Judge McNaught on September 16, 1980. The consent

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[1] MAMLEO is the successor organization to MAAAP. MAMLEO is the defendant-intervenor in the cases at bar.

decree provided for the establishment of goals and timetables for the promotion of blacks to the position of sergeant. The decree provided that the Department would promote no more than 25 officers from the then-existing eligibility list to permanent positions of sergeant. The decree stated that the Department should not use promotional tests for the purpose of selecting police officers for promotion unless the tests were validated in accordance with the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. § 1607.1 et seq., or otherwise shown to have no discriminatory impact. In addition, the decree required the Department to provide all eligible applicants the opportunity for training before promotional tests, to ensure minority applicants equal access to such

training, and to post notice of promotional exams at least sixty days in advance. The consent decree was to remain in effect for five years unless any party moved for its continuation on the ground that its objectives had not been fully achieved.

As of late 1985, none of the goals in the consent decree had been met. On October 31, 1985, Judge McNaught extended the life of the consent decree. On September 19, 1990, Judge McNaught granted the joint motion by MAMLEO and the Department to extend the consent decree to cover one additional round of promotions. Thus, the consent decree will expire by its own terms after the next sergeants' promotional exam, currently scheduled for 1991.

On June 5, 1990, defendant David Haley issued a notice that the 1988 sergeants'

eligibility list was being revoked, effective that day. The reasons given were that the use of the list would conflict with the consent decree, and that the list constituted a public safety emergency. The plaintiffs challenge the revocation of the list, claiming that the action was beyond Haley's authority under M.G.L c. 31, § 25. In denying the plaintiffs' motion for a preliminary injunction ordering Haley to revive in the 1988

eligibility list, Judge McNaught stated:

> [T]he plaintiffs have not shown a reasonable likelihood of success on the merits. The consent decree passes muster under the test of the Unites States Constitution. It follows, therefore, that a decision to revoke the 1988 eligibility list on the grounds that it would violate the consent decree stands.

Memorandum and Order Denying Plaintiffs' Motion for a Preliminary Injunction at 2

(McNaught, D.J., June 27, 1990).

Discussion

The plaintiffs argue that the promotional policy followed by defendants as required by the consent decree violates plaintiffs' rights under § 1981, § 1983, the equal protection clause, and the fifth amendment. The defendants argue that the consent decree is valid and does not impermissibly discriminate against the plaintiffs. The burden of proof is on the plaintiffs to demonstrate the unconstitutionality of the consent decree. See Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267, 277-78 (1986).

The deference accorded to a consent decree should be at least as great as that

accorded to a voluntary affirmative action plan. See In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1500-01 (11th Cir. 1987), aff'd sub nom., Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180 (1989) (subjecting a consent decree to the same level of scrutiny as a voluntary affirmative action plan). The Supreme Court recently set out of the standard for evaluating the constitutionality of voluntary state and local minority set-aside programs in City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct. 706 (1989). In Croson, the Supreme Court struck down a minority set-aside program that required prime contractors to award at least 30% of the dollar amount of each city construction contract to minority-owned businesses. Although the Court was deeply

divided and issued six separate opinions, the majority agrees that the standard of review under the equal protection clause did not depend on the race of those burdened or benefitted by a particular classification. 488 U.S. at 494. The plurality in Croson stated its "continued adherence to the standard of review employed in Wygant." Id. In both Croson and Wygant, the Court applied strict scrutiny to the racial classification at issue. Under the strict scrutiny standard, the racial classification must be supported by a compelling governmental purpose, and the means chosen to accomplish that purpose must be narrowly tailored. See Wygant, 476 U.S. at 274; Croson, 488 U.S. at 493-94.

The Court further noted in its plurality opinion in Wygant that when a remedial

affirmative action program is challenged by nonminority employees, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." 476 U.S. at 277. In her concurrence, Justice O'Connor further explained the plurality's holding:

> The court is in agreement that...remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

476 U.S. at 286 (O'Connor, J., concurring in part and concurring and concurring in the judgment).

The Plaintiffs argue that the city of Boston and the Boston Police Department could not have had a compelling interest in enacting an affirmative action program because they failed to demonstrate that they had engaged in discriminatory employment practices prior to entering into the consent decree. The plaintiffs note that the consent decree itself specifically declines to make any finding of past discrimination:

> The consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI, 42 U.S.C. §§ 1981, 1983, and 1988; Mass. Gen. Laws c.31 § 10; Mass. Gen. Laws c.151B; or Article I, Part the First, Constitution of Massachusetts; nor shall it be construed as an admission by the defendants to any of the matters in the complaint filed in this action.

(Consent Decree at 3) The plaintiffs claim

that this disclaimer of liability establishes that the Department did not have a compelling reason to enter into the consent decree.

I find that the language in the consent decree and the lack of an explicit finding of past discrimination by the Department or by Judge McNaught are not dispositive; "a majority of the Court has explicitly rejected the argument that the entity seeking to institute the plan has committed discriminatory acts in the past..." Wygant, 476 U.S. at 312 n.7 (Marshall, J., dissenting). Justice O'Connor's concurrence in Wygant states: "I...agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an

affirmative action plan." 476 U.S. at 289 (O'Connor, J., concurring).

Rather than requiring a formal finding of past discrimination, the Court in Croson and Wygant has required that the employer have a "a strong basis in evidence for its conclusion that remedial action was necessary." Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277). Once the employer introduces statistical proof as evidence of its remedial purpose, the nonminority employees bear the burden of persuading the court that the employer's evidence did not support an interference of prior discrimination, or that the plan was not narrowly tailored. "Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the

[employer's] assertedly remedial action based on the statistical evidence was justified." Wygant, 476 U.S. at 293 (O'Connor, J., concurring).

To support their contention that the Department had a strong basis in evidence to support its decision to enter into the consent decree, the defendants have pointed to the statistical evidence of past discrimination that was presented in the MAAAP proceedings. As of March 2, 1978, when MAAAP filed its complaint, approximately 111 (or 5.5%) of the estimated 2,232 sworn officers in the Department were black, whereas the population of Boston was approximately 20% black. (Consent Decree at 2) Only one (or .45%) of the 222 sergeants in the Department was black, despite the fact that blacks comprised 4.5% of all officers

with the minimum service eligibility required for promotion to sergeant.[2] (Consent Decree, Appendix B at 1) Of the approximately 50 lieutenants and 25 captains, there were no blacks. (Consent Decree at 2) Further, there were no black officers assigned to Homicide, General Investigations (robbery), Hackney, or Organized Crime units. Of the approximately 20 to 30 officers assigned to the Vice Unit, there was only one black officer. There were no blacks among the approximately 30 detective sergeants of the approximately eight detective lieutenants. None of the four superintendents in the Department was black, and only two of the

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[2] One of the Department's eligibility requirements for promotion to sergeant was three years of service after certification. (Consent Decree, Appendix B at 1)

deputy superintendents in the Department was black. (Verified Complaint and Defendants' Answer at 15, 16) In addition to the statistical evidence, there is evidence that prior to entering the consent decree, the Department had not been using promotional examinations that had been validated in accordance with the "Uniform Guidelines on Employee Selection Procedure," 29 C.F.R. § 1607.1 et seq. (Consent Decree at 4-5)

I find that the evidence above goes far beyond a mere showing of societal discrimination and satisfies the standard set out by the Supreme Court in Croson. The plurality in Croson stated:

> There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.

> Hazelwood School Dist. v. United States, 433 U.S. 299, 307-308 (1977)...In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of the relevant population may be probative of a pattern of discrimination...But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must b e the number of minorities qualified to undertake the particular task.

488 U.S. at 501-02. Given the disparity between the number of blacks who were eligible to be promoted to the position of sergeant and the number who were actually promoted (one), I conclude that the Department had a strong basis in evidence for its conclusion that remedial action was necessary. The racial classifications contained in the consent decree were supported by a compelling governmental

interest.

Under the second prong of the strict scrutiny standard, the means chosen to accomplish the compelling governmental interest must be narrowly tailored. The plaintiffs have presented four arguments supporting their position that the consent decree is not narrowly tailored. First, since there was no evidence of actual instances of past discrimination, the affirmative action program contained in the decree was not necessary to remedy past discrimination. Second, there is no evidence that a race-neutral scheme was considered before the establishment of a race-based scheme. Third, although the consent decree was established with an anticipated five-year termination date, it has been extended twice, first for another five years, and most

recently to apply to the next promotional examination (scheduled for 1991). The basis for the first extension was the original goal of 25 black sergeants by 1985 had not been met. By the time of the second extension, there were 27 black sergeants. Nevertheless, Judge McNaught allowed the joint motion by the Department and MAMLEO to establish a new goal of 40 black sergeants by December 1991 to reflect the current racial demographies of the Department. Finally, the plaintiffs point to the impact of the decree on the white police officers, who were not parties to the consent decree, but have been passed over the promotions.

The defendants, on the other hand, claim that the consent decree is narrowly tailored. They note that rather than adopting a rigid quota system, the consent decree requires

validated, non-discriminatory examinations and establishes goals for the promotion of black officers. Under the consent decree, only qualified black applicants who pass the eligibility examination can be promoted to sergeant. Although some whites have been passed over for promotion by blacks with lower examination scores, the consent decree does not bar the promotion of whites to sergeant; of the 158 officers who have been promoted to sergeant since the entry of the consent decree, 31 (or 19.6%) have been black. (Joint Motion to Modify and Continue Consent Decree at 2) The consent decree has not caused any officer to be discharged or demoted.

In Croson, the plurality stated in dicta that Richmond's minority set-aside program was not narrowly tailored. First, the Court

noted that the plan was not linked to identified discrimination in any way. 488 U.S. at 507. Second, the Court stated that the city had not considered the use of race-neutral means to increase minority participation in city contracting. Id. Finally, the Court stated that the program's 30% quota rested on the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." Id.

The concerns noted by the Court in Croson are not present in this case. As I have discussed already, the affirmative action program was supported by strong statistical evidence of past discrimination by the Department in promoting blacks to the position of sergeant. The consent decree

describes the inadequacy of previous efforts by the Department to reform the testing system used to determine promotions. (Consent Decree at 2-4) In the 1970's, the Department tried to reduce the impact of seniority on test outcomes, but still found that blacks were not "yet... competing on a completely equal footing with the rest of the available pool of applicants for sergeant." (Consent Decree at 4) Unlike the decree in Croson, the decree in this case does not set a rigid quota based on the proportion of blacks in the local population. Instead, the promotion goals contained in the decree are based on the projected number of black officers eligible to be promoted from lists based on validated tests. (Consent Decree at 4-5)

Although the decree results in the promotion of some blacks ahead of some whites

with higher examination scores, it does not "unnecessarily trammel the interests of the white employees." United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979). No whites have been discharged or demoted under the terms of the consent decree. Nor does the plan create an "absolute bar to the advancement of white employees..." Weber, 443 U.S. at 208. As the Supreme Court noted in Wygant, "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." 476 U.S. at 282-83. Finally, "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Weber, 443 U.S. at 208.

In sum, the defendants have not violated the plaintiffs' right to equal protection under the fourteenth amendment. The

plaintiffs' due process claim also fails, because a police officer's interest in becoming a sergeant does not rise to the level of a property interest entitled to constitutional protection. Burns v. Sullivan, 619 F. 2d 99, 104 (1st) cir. 1980), cert. denied, 499 U.S. 893 (1980). Finally, I conclude that the defendants did not engage in purposeful racial discrimination under § 1981. See General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 391 (1982). The defendants' reason for entering into the consent decree was to remedy past discrimination against blacks, not to discriminate against whites. Since I find that there has been no"conduct motivated by a discriminatory purpose," there can be no liability under § 1981. General Building Contractors, 458 U.S. at 386. Therefore, I

need not address the issue of whether a promotion to the position of sergeant constitutes a "new and distinct relation between the employee and the employer" as required by the Supreme Court in Patterson v. McLean Credit Union, 491 U.S. 164, 185, 109 S. Ct. 2363, 2377 (1989). I find that there is no genuine issue of material fact with respect to any of the plaintiffs' claims.

Accordingly, plaintiffs' motion for summary judgment is **denied.** The motion for summary judgment by the defendant-intervenor, Massachusetts Association of Minority Law Enforcement Officers, is **allowed.**

PROPOSED CONSENT DECREE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., et al.,

Plaintiffs,

v.

THE BOSTON POLICE DEPARTMENT, et al.,

Defendants.

CONSENT DECREE

Plaintiffs, Massachusetts Association of Afro-American Police, Inc. ("MAAAP"), et al., filed their complaint in this action on March 2, 1978. The complaint sought certification of the suit as a class action and alleged that the defendants were engaged in employment discrimination based on race and

color in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., as amended by the Equal Employment Opportunity Act of 1972; Title VI of the Civil Rights Act of 1964 42 U.S.C. § 1983; the Civil Rights Act of 1870, 42 U.S.C. § 1981; 42 U.S.C. § 1988; Mass. Gen. Law c.31, §10; Mass. Gen. Laws c.151B, and Article I, Part the First, Constitution of Massachusetts.

The defendants are the Boston Police Department ("Department"), Department Commissioner Joseph Jordan ("Commissioner", "Jordan"), Mayor Kevin H. White ("Mayor", "White"), Massachusetts Personnel Administrator David Marchand (""Administrator", "Marchand"), and the members of the Massachusetts Civil Service Commission. The Department, Jordan and White

are referred to collectively as the "City Defendants"' the others are referred to collectively as the "State Defendants".

Plaintiffs seek declaratory judgment, injunctive relief, and monetary damages.

The Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§ 1131, 1343(4), and 1345.

As of March 2, 1978, when this action was commenced, approximately 111 or 5.5 percent of the estimated 2,232 sworn officers in the Department were black, whereas the population of the City of Boston was approximately 20 percent black. 108 or 5.8 percent of the estimated 1,831 police officers in the Department were black; 3 or 1 percent of 269 sergeants were black; there were no blacks among the 50 lieutenants or 25 captains in the Department.

Promotion of sworn officers is to a large degree dependent on the operation and administration of the Massachusetts civil service law by State Defendants.

It now appears to the Court that all parties have waived hearings, findings of fact, and conclusions of law and have agreed to the entry of this Decree. The consent of the parties shall in no manner constitute findings on the merits in this action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI 42 U.S.C. §§ 1981, 1983, and 1988; Mass. Gen Laws c.31, §10; Mass. Gen. Laws c. 151B; or Article I, Part the First, Constitution of Massachusetts; nor shall it be construed as an admission by the defendants to any of the matters in the complaint filed in this action. To the

extent that this action involved allegations of employment discrimination in promotion other than to the rank of sergeant, assignment, training, discipline, treatment, and other terms and conditions of employment, such allegations are not resolved herein, nor are they intended to be, and they are in effect being voluntarily dismissed without any prejudice whatsoever.

In connection with the entry of this Decree, the action is certified as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure, the class being:

> All present and future black sworn officers in the Boston Police Department.

I. GENERAL

1. In the event that the entry of this Decree generates, either through intervention

or in separate, collateral lawsuits, challenges to the propriety of any remedial measure contained herein, the parties to this Decree shall defend the lawfulness of this Decree. If any such collateral lawsuit arises in a State Court, the defendant shall remove such action to the Federal District Court.

II. SERGEANTS' LIST

2. The Boston Police Department will promote no more that twenty-five officers from the existing eligible list as established in March 1979 for permanent positions of sergeant (the "1979 List"). The Department shall make every effort, when making these appointments, to maintain sufficient vacancies in the rank of sergeant to comply with the goals referred in paragraph 7 of this Decree.

3. The Department shall notify MAAAP as soon as it anticipates requesting certifications for appointment to permanent positions of sergeant and shall provide it in writing with the number and dates of these anticipated appointments.

III. PROMOTIONAL TESTS

4. The defendants shall not use tests (including written examinations, practical exercises, and training and experience scores) for the purpose of selecting police officers for promotion unless such tests are validated in accordance with the "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R § 1607.1 et seq. (The "Guidelines"), or otherwise shown to have no discriminatory impact. All parties shall cooperate in developing acceptable tests. The persons developing and administering such tests shall

be properly trained as required by the Guidelines.

5. At least 75 days prior to the defendants' intended use of any promotional test, they shall submit to plaintiffs' counsel copies of validation studies showing that the particular tests conform with the Guidelines. Such materials shall be treated as confidential material within the meaning of the Protective Order appended to this Decree as Appendix A. If the parties disagree as to whether a particular test, its scoring, or the ranking based on its results, has been shown to be valid within the meaning of the Guidelines, the question of its validity shall be resolved by the Court, and such resolution, whether by the parties' agreement or by the Court, shall be accomplished before any such test is put into

use for the purpose of qualifying or selecting.

6. The Department will provide opportunity for training for all eligible applicants before promotional tests and will ensure that minority applicants for promotion are afforded equal access to such training. The Department shall also post notice of forthcoming promotional exams on all bulletin boards used by the Department for making announcements to police officers at least 60 days in advance of any written examination for promotion to enable interested police officers to have sufficient time to apply for and prepare for such examinations.

7. Persons passing future validated tests shall be ranked in a manner which complies with the Guidelines. The Commissioner shall make appointments to

overcome any underutilization that may exist among sergeants in accordance with the goals set forth in Appendix B to this Decree.

8. The merger, if any, of promotional lists will be made in a manner consistent with the Guidelines.

9. The State Defendants shall delegate to the Department the responsibility for construction, validation and administration of new tests for promotion to sergeant, provided, however, that:

(i) The State defendants will notify plaintiffs' counsel of any delegation and will provide them with copies of any memoranda of agreement relating to said delegation;

(ii) any delegation by the State defendants shall be subject to revocation by them in the event that any of the delegated

duties or responsibilities are exercised in violation of, or in a manner inconsistent with, any provision of this Decree. In such event the State defendants shall revoke the delegated authority and reassume the delegated functions.

10. Defendant Boston Police Department without delay shall take specific steps to implement its Affirmative Action Plan as set forth in Appendix C attached to this Decree. Nothing in this Decree shall be construed to limit the Department's authority to amend its Affirmative Action Plan in a manner consistent with the attainment of the objectives of this Decree. In any event, at least 30 days prior to any proposed amendment, the Department will notify MAAAP in writing of the proposed amendment.

11. The Affirmative Action Committee of Defendant Boston Police Department shall report to counsel for the parties within 60 days of the entry of this Decree as to the steps it is taking to implement the Department's Affirmative Action Plan.

12. Within 90 days from the entry of this Decree, the parties shall meet to determine the amount due to plaintiffs' counsel for costs and attorneys' fees. If the parties are unable to agree, the matter shall be presented to the Court for resolution upon motion of either party.

13. The court shall retain jurisdiction for such further action as may be necessary or appropriate. The Decree shall terminate after five years from its entry unless any party has moved for its continuation on ground that the objectives of the Decree have

not been fully achieved. The Court will thereupon determine whether or not the Decree will be dissolved.

Dated this day of 1980.

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COURT ORDER

The above Consent Decree is allowed, and its terms are to be entered as an order of this Court.

Dated: _____

_____
John J. McNaught
U.S. District Judge

BOSTON POLICE DEPARTMENT

Appendix B

There are currently 222 Sergeants in the Boston Police Department, one of whom is black. Two other blacks who hold the permanent civil service rank of Sergeant are members of the Command Staff as Deputy Superintendent or Superintendent, in positions exempt form Civil Service. the one black now serving as a sergeant accounts for .45% of all sergeants in the department. This compares with a percentage minimum service eligibility factor of 4.5%. (There are currently 72 black officers who are eligible for promotion to sergeant, in that they have three years of service after certification.) There are a total of 1601 officers in the department of all races who are similarly eligible.

The reason for the under-representation of minorities in the sergeant's pool includes the following:

Thirty-four of the eligible black officers were hired in 1974 and 1975. Fourteen of those persons were hired in February, 1974. Those fourteen have been eligible to take only one sergeant's examination, that is, the examination given in February of 1977. The other 20 black officers were hired in February of 1975. They have had no opportunity to take a sergeant's examination because none has been administered since February, 1977 examination. They did not have the three years eligibility to take that exam. Therefore at the time of the last examination for sergeant, only 3.1% of the eligible applicants for sergeant were black, and only

2.3% of the eligible candidates were blacks with at least seven years service in the department at the time of the last promotional examination. The relatively small number of eligible applicants can perhaps be traced to the testing practices of the then State Division of Civil Service (See Castro v. Beecher).

Testing practices for promotional positions for the Boston Police Department have been revised significantly since 1972. Prior to that time a very high percentage of the test results (generally more than 40% of the final score) was determined by seniority. The department has significantly reduced the impact of seniority on test outcomes since then. However, it is reasonable to assume notwithstanding these changes, that seniority continues to have some impact. Seniority has

a statutorily defined role through the requirement that experience be rated in promotional positions in the Commonwealth. It is also clear that some level of experience beyond the three years minimum is helpful in preparing applicants for the responsibilities of supervisory positions. This extra experience is helpful in preparing applicants for the selection procedures used in promotion, through the broadening of their knowledge of departmental procedures, rules, statutes, accepted policing and supervisory practices, leadership, judgment, which are the principal areas tested in the promotion process.

In the past, the Department has found that seven or more years experience has been an appropriate measure of the point at which a police officer may be viewed as at the tip

of his/her skills, having had enough experience in the department to have encountered and dealt with almost all of the kinds of problems officers face and to have dealt with the most common of them frequently enough to have mastered the technique for dealing with them. (A review of the results of the two most recent sergeant examinations, given since seniority was drastically reduced, shows that for those promoted from the 1974 examination, the median seniority was 17 years, 11 months and for those on the March 1979 list, the median seniority at the time of completing the examination process was 11 years.)

The number of minority police officers in the department is rising dramatically, due in large part to the certification rule changes arising from Castro v. Beecher.

Thus, the percentage of blacks eligible for promotion to sergeant should also rise significantly over the next several years. However, it is also likely that because these will, of necessity, be persons of reasonably short experience and seniority in the department, they will not yet be competing on a completely equal footing with the rest of the available pool of applicants for sergeant. A further consideration making projections on the make-up of future promotion lists difficult is the widely differing verbal skills of the officers who take promotional tests.

In order to prevent the disparity between the percentage of black supervisors and the percentage of blacks eligible for promotion to supervisor from growing, and in order to reduce that disparity, it is

appropriate that the department take affirmative measures to promote more blacks to supervisory positions.

This can be done by taking further steps beyond what has already been accomplished to ensure that promotional examinations are job-related and to minimize the disparate impact on blacks. The department will conduct pre-promotional training classes, open to all members of the department who are eligible for promotion to sergeant and will assure that word difficulty, sentence complexity, etc. on promotional examinations is no greater than required by the job content of the material involved. The department will also seek to further reduce the impact of straight seniority on the selection process.

GOALS AND TIMETABLES

The goals and timetables outlined below are based upon the guidelines in Section 1608.4 of the Guidelines on Affirmative Action of the Equal Employment Opportunity Commission, 29 C.F.R. Part 1608. These goals and timetables take into account the unintentional discrimination found and the remedies implemented in the case of Castro v. Beecher as it affected entry level hiring; the need for prompt elimination of adverse impact or disparate treatment;the availability of qualified or qualifiable applicants; and the number of promotional opportunities expected to be available. The parties agree that the obligation of the Department is to make a good-faith effort to reach these goals and that these goals have been sent in anticipation of having a

sufficient number of black officers eligible to be promoted form lists based on validated tests. The goals and timetables are organized according to projected employment statistics as of the dates listed below:

Appendix

BOSTON POLICE DEPARTMENT

GOALS AND TIMETABLES: BOSTON POLICE SERGEANT

Date	Projected No. Of Sergeants	Projected No. Of Positions To Be Filled	Projection of Blacks As A Percentage Of Patrol Officers With 3 Years In Grade*	Projection of Blacks As A Percentage Of Patrol Officers With 7 Years In Grade**	GOALS	
					No. of Black Sergeants***	Blacks As A Percentage Of Sergeant
July 1980	228	25	4.4	2.6	3	1.3
Dec. 1981	242	24	7.1	3.4	8	3.2
Dec. 1982	270	35	7.0	4.6	13	4.8
Dec. 1983	270	30	12.6	4.4	18	6.7
Feb. 1985	270	35	14.6	6.9	25	9.2

* Three years in grade as a patrol officer is a requirement for promotion to sergeant.

** It has been the experience of the Department that those officers actually promoted to sergeant have had 7 years in grade as patrol officers.

*** Includes sergeants who serve in higher, non-civil service positions.

The figures in these Goals and Timetables do not reflect unanticipated attrition.

APPENDIX C

Implementation of Boston Police Department Affirmative Action Plan

The following steps shall be taken to implement the Boston Police Department Affirmative Action Plan insofar as it applies to black sworn personnel. Parenthetical references are to sections and pages of the Boston Police Department Affirmative Action Plan dated January 1977.

Internal Dissemination of Policy (Part III)

1. Copies of the Affirmative Action Plan will be made available to all employees for their inspection at reasonable times. Employees will by notified of them. (p.2)

2. A briefing on the Department's Affirmative Action policy will be a regular part of the Department's orientation programs. (p. 2)

3. All Affirmative Action policy decisions shall be posted on bulletin boards and translated into appropriate languages. (p. 2-3)

4. The Department's Policy Manual will contain a copy of the Equal Employment Opportunity Statement. (p. 3)

5. All union agreements and personnel contracts will contain provisions ensuring nondiscrimination. (p. 3)

Affirmative Action Committee (Part IV)

6. The Department will establish an Affirmative Action Committee. The Commissioner shall solicit applications for membership on the Committee and shall make appointments which are representative of each major job classification with an emphasis on the recruitment of women, minorities and older workers. The Affirmative Action

Committee shall review the progress of Departmental Affirmative Action, monitor the implementation of Departmental goals and timetables, review job assignment patterns, review the status of any employment discrimination complaints made by employees or applicants, and submit monthly reports to the Commissioner (p. 3; Executive Order of February 23, 1976, as amended March 18, 1976, § VII.)

7. The following persons shall be included on the Affirmative Action Committee: William Celester and Roy Howard. In addition, the Committee or the minority members of the Committee may make recommendations to the Commissioner as necessary for specific action to overcome EEO difficulties within the Department. The Commissioner shall review such

recommendations and shall make a good faith effort to implement them or provide the Committee with an explanation in writing of the reason for not doing so.

8. The Department will appoint an Equal Employment Opportunity Officer who will be jointly responsible with the Commissioner for implementation of the Affirmative Action Plan. (City of Boston Affirmative Action Program §4b.)

Promotions (Part X)

9. Every employee will be notified of his or her salary review at least four weeks in advance. (p. 150)

10. Every employee will have the opportunity to discuss his or her performance, current openings on the job vacancy list, or other matters relevant to promotion, with supervisor at least four

weeks prior to review. (p. 150)

11. Every employee will receive copies of all evaluations and promotional recommendations made by his or her salary review. (p. 150)

12. Any evaluation form used will be designed not to encourage discrimination practices. (p. 150)

13. Every employee will be notified of rights and responsibilities in the salary review process. (p. 151)

14. The Department, as part of its program, will design in conjunction with MOHR and implement a training program to upgrade the talents of minority, female and older worker employees. The program shall include instruction in language, clerical, trade and supervisory and management skills. (Boston AAP § 4g.)

15. Promotional tests will be validated in accordance with the Uniform Guidelines on Employee Selection Procedures (1978) of the Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and Department of Labor. (p. 154.)

Complaint Procedure (Part XIV)

16. A notice will be placed on all bulletin boards advising employees that any grievance of allegations of discrimination may be brought to the Investigative Unit of the Affirmative Action Program of the City of Boston, or the EEOC, and that no employee who seeks relief will be subjected to reprisal, intimidation or harassment. The notice will also set forth the complaint procedure for city employees set forth in the City of Boston Affirmative Action Program. (p. 157; Boston AAP § 6.) (See Exhibit A for copy.)

Affirmative Action Progress Reports (Part XV)

17. Affirmative Action Progress reports, listing all employees, salary, race and sex, all promotions, terminations, hiring transfers within six-month intervals and all sources used by the Department in finding prospective candidates will be compiled at six-month intervals by the Personnel Division and submitted to the Affirmative Action Committee. (p. 158; Boston AAP, § 3.)

18. The Department semi-annually shall furnish to MOHR on forms to be provided by it and to the Department's Affirmative Action Committee, the following information;

1. Name of departmental personnel involved in hiring and promotion.
2. Department table of organization.
3. Job classification.

4. Compensation rates for each classification.
5. Existing job description for each classification.
6. An update job description if the existing one does not correspond to the work actually being done.
7. Vocational qualifications of persons holding the positions.
8. Pension, tenure, and other prerequisites attached to the job.
9, Departmental criteria for promotion.
10. Departmental criteria for demotion.
11. Number and/or names of minority, female and older worker employees stratified by their classifications.

12. Explanation of hiring practices, including recruitment and advertising sources.
13. Names of unions representing employees and departmental stewards.
14. Type of information customarily collected on employees.
15. List of all positions which became open or were created (even if already filled) during the previous year.
16. Approximate number of people applying for the job referred to in (15).
17. Names and addresses of minority, females, and older workers applicants for the job referred to in (15).

18. Promotions made during the previous 6 months.

19. Names of minority, female, and older worker employees passed over for promotion.

20. Names of persons receiving the promotions. (City of Boston AAP, § 4c.)

Goals and Timetables (Part XVI)

19. The Department will conduct annual utilization analyses by Division and by Unit and will set goals and timetables for overcoming any underutilization of minorities and women in any division or Unit as described in the OFCCP Affirmative Action Guidelines - Order No. 4, 41 CFR 60-2 and will submit such utilization analyses and goals and timetables to the Affirmative Action Committee for its review. (p. 158;

Boston AAP, §§ 1a & b, 3, 4a; Mayoral Executive Order of February 23, 1976, as amended March 18, 1976, §§ III, IV.)

20. The Department will solicit minorities and women to take the Civil Service exams for positions in the Department. This effort will include advising agencies which can help recruit minorities and women of upcoming exams.

EXHIBIT A

COMPLAINT PROCEDURE FOR CITY EMPLOYEES

The use of the complaint procedure is not intended to preclude an employee or job applicant from utilizing those other remedies to which he/she is entitled, including those set forth in any relevant collective bargaining agreement, as well as those remedies available under state and federal law.

(a) Any city employee may file a discrimination complaint with MOHR.

(b) Upon receipt of a complaint, MOHR shall conduct an investigation to determine if discrimination exists. If discrimination does not exist, the complaint shall be dismissed. If discrimination is found to exist, MOHR shall endeavor to obtain a conciliatory agreement between the parties. If conciliation between the parties is impossible, MOHR shall determine the matter.

(c) An employee or department head may within 10 days after being notified of any determination by MOHR appeal to the Employment Practices Appeal Board which shall make a final disposition of the case.

(d) Said Board shall consist of the following members: The Corporation Counsel, who shall chair the Board, the Deputy Mayor,

the Director of the Mayor's Office of Personnel, the Administrator of the Mayor's Office of Human Rights, the Chairwoman of the Commission to Improve the Status of Women, a Union Representative, and a member who shall be appointed annually by the Mayor. The Mayor shall further designate three alternatives to the Board.

Supreme Court, U.S.
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OFFICE OF THE CLERK

(2)

No. 91-1516

In the
Supreme Court of the United States

October Term, 1991

ANN G. STUART, et al
Petitioners,

v.

FRANCIS M. ROACHE, As He is
Police Commissioner of the City of Boston, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF MASSACHUSETTS PERSONNEL ADMINISTRATOR

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QUESTION PRESENTED

Whether there was a "strong basis in evidence" of past discrimination, so as to justify race-conscious relief in a consent decree governing certain promotions in the Boston Police Department?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the Petition for Certiorari. This brief in opposition is submitted by the state respondent, the Massachusetts Personnel Administrator.

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Pursuant to Supreme Court Rule 15, the respondent Massachusetts Personnel Administrator submits this brief in opposition to the petition for writ of certiorari filed in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 951 F.2d 446 (1st Cir. 1991). See Appendix to Petition, pp. 1-47.[1/] The decision of the United States District Court for the District of Massachusetts was not reported. App. 48-73.

1/ References to the Appendix to the Petition for Writ of Certiorari will hereafter be designated "App. [page #]".

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are white patrol officers in the respondent Boston Police Department (the "Department"). They contend that the Department has contravened their rights under, inter alia, the Equal Protection Clause of the Fourteenth Amendment by promoting officers to the rank of sergeant in accordance with a consent decree entered in Massachusetts Association of Afro-American Police, Inc., et al. v. Boston Police Department, et al., United

States District Court, District of Massachusetts, No. 78-529-S (hereafter the "Consent Decree" or the "Decree"). Record Appendix, pp. 33-36.[2/] Petitioners also contend that the respondent Massachusetts Personnel Administrator (the "Personnel Administrator") has acted contrary to their rights under the Equal Protection Clause by approving such promotions in the exercise of his authority under Massachusetts civil service law. R.A. 19-36.

The Consent Decree

In 1978, the Massachusetts Association of Afro-American Police, Inc. ("MAAP"), and two individual black

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2/ References to the Record Appendix which was filed with the petitioners' brief in the Court of Appeals will hereafter be designated "R.A. [page #]".

Boston police officers filed an action in the United States District Court for the District of Massachusetts under, inter alia, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., seeking to redress alleged unlawful discrimination against black officers in the Boston Police Department with respect to promotions, job assignments and compensation. R.A. 155-193. This litigation was settled, without admissions of liability, by the entry of a Consent Decree, which was approved by the District Court on September 16, 1980. App. 74-110. The Consent Decree was signed by, among others, the Department and the Personnel Administrator.

The Consent Decree required that examinations used to select officers for

promotion to sergeant be validated in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 et seq.. The Consent Decree also required the Department to provide training to all persons taking such examinations. App. 80-82.

The Consent Decree also established goals and timetables for the promotion of qualified black officers to the rank of sergeant. App. 95-97.[3/] These goals were tied to the size of

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3/ With respect to the need for promotional goals, the Consent Decree stated, among other things, that as of the date of its entry, although 4.5% of all Boston Police officers eligible to compete for promotion to sergeant were black, the Department had only one black sergeant, who accounted for .45% of all sergeants. App. 88-96. The Decree also cited findings of unintentional discrimination against minorities in entry level hiring made in a prior action, Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972). App. 95.

the pool of black officers eligible to compete for promotion to sergeant. App. 97. The Consent Decree did not establish racial quotas, however, stating:

> [t]he parties agree that the obligation of the Department is to make a good faith effort to reach these goals and that these goals have been set in anticipation of having a sufficient number of black officers to be promoted from lists based on validated tests.

App. 95-96. The Consent Decree did not require the demotion or discharge of any officer, or reduce the benefits paid to any officer.

The Consent Decree was originally entered for a five year term. App. 85. It has been extended twice, in 1985 and 1990, because the Department had not attained the sergeants promotional goal. When the Decree was extended, this goal was adjusted upward due to an

increase in the number of black officers eligible to compete for promotion to sergeant. R.A. 142-150. The Consent Decree's final promotional goal was a 15.5% representation of blacks in the rank of sergeant, as compared to a 19.56% representation of blacks among all officers eligible to compete for promotion to sergeant. App. 35, 47.

Since the Court of Appeals' decision was issued on December 23, 1991, the Department has reached the promotional goal set forth in the Consent Decree. On April 10, 1992, the Department promoted eighty-five (85) officers to the rank of sergeant, fifteen (15) of whom are black. As a result of these promotions, and pursuant to an amendment to the Consent Decree approved by the District Court on December 3, 1991, the

Decree's affirmative action goals and timetables have expired. Consequently, the racial preferences to which petitioners object in this case are no longer provided for in the Consent Decree.[4/]

Proceedings below

Petitioners filed this action in October 1990, alleging that they were passed over by the Department for promotions to the rank of sergeant in favor of black officers with lower scores on the civil service police promotional examination. Petitioners

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4/ The information set forth in this paragraph is not in the record of this case, but is included here as it bears directly upon the appropriateness of review of this case. See Supreme Court Rule 15.1. See also Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985) (describing counsel's duty to inform the Court of developments which may conceivably affect the outcome of the litigation).

claimed that their rights under, inter alia, the Equal Protection Clause were thereby violated, and sought declaratory and injunctive relief. R.A. 11-39.

The Department did not dispute that it had "bypassed" petitioners in promoting certain black officers to sergeant. Rather, the Department maintained that its actions did not amount to impermissible discrimination and were in all respects lawful as in accordance with the Consent Decree in the MAAP case. The Personnel Administrator similarly defended his actions by reference to the Consent Decree. App. 55.

Motions for summary judgment were filed by all parties. The District Court held that the promotional process under the Consent Decree is

constitutionally valid under the strict scrutiny standard articulated by this Court in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), and granted summary judgment for respondents. App. 55-73. The Court of Appeals for the First Circuit affirmed. 951 F.2d 446.

REASONS FOR DENYING THE WRIT

This petition does not present a question of "such gravity and general importance" as to warrant review by this Court. In re Woods, 143 U.S. 202, 206 (1892). Petitioners do not contend that the decision below conflicts with that of any other court of appeals. Rather, petitioners challenge only the lower court's assessment of the sufficiency of the evidence to establish the necessary

predicate for race-conscious judicial relief. In addition, because the racial preference to which petitioners object is no longer provided for in the Consent Decree, the issue litigated below is not of sufficient continuing importance to merit review by this Court.

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND IS CHALLENGED BY PETITIONERS ONLY TO RAISE QUESTIONS OF EVIDENCE UNIQUE TO THIS CASE.

In City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), a majority of the Court agreed for the first time that race-based preferences must be reviewed under a standard of strict scrutiny when challenged as violative of the Equal Protection Clause of the Fourteenth Amendment. Id. at 494 (plurality); id. at 519 (Kennedy, J., concurring in part

and concurring in the judgment). To meet this standard, race-conscious judicial relief must be justified by "a compelling interest", id. at 505, and be "narrowly tailored" to further that interest. Id. at 507-508. See United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality) (setting out two-part strict scrutiny test). Remedying identified past discrimination constitutes a compelling state interest and is therefore a sufficient predicate for ameliorative race-based preferences. Croson, 488 U.S. at 500-505; Paradise, 480 U.S. at 167 (plurality); Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986) (plurality). The foregoing principles were carefully applied by the Court of Appeals in reviewing the Department's

promotional process under the Consent Decree. 951 F.2d at 449-455. (App. 10-41). Petitioners do not urge that a different standard should have pertained.

The Court of Appeals determined that there must be a "strong basis in evidence" to justify the conclusion that race-conscious remedial action was necessary to remedy past discrimination. 951 F.2d at 449-450. (App. 13-14). See Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277 (plurality). In upholding the Consent Decree, the Court of Appeals found that the evidence before it met this test. 951 F.2d at 450-453. (App. 14-33). Petitioners do not object to this evidentiary standard; they simply argue that the particular mix and quantum of evidence before the District Court was

not "strong" enough. See e.g. Petition, pp. 10-11. Because petitioners ask this Court to review no more than the lower court's assessment of the evidence in the particular circumstances of this case, the petition should be denied. See General Pictures Co. v. General Electric Co., 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence or inferences drawn from it.")

In any event, petitioners' two fundamental complaints about the Court of Appeals' evaluation of the evidence are misplaced. Petitioners contend that the court below improperly considered statistics to which the Department stipulated in the Consent Decree showing the substantial disparity between the number of black officers eligible to

compete for promotion to sergeant, and the number of black sergeants.[5/] In Croson, however, the Court acknowledged "that '[w]here gross statistical disparities can be shown, they alone in a proper case may consititute prima facie proof of a pattern or practice of discrimination' under Title VII," 488 U.S. at 501, quoting Hazelwood School District v. United States, 433 U.S. 299,

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5/ Although petitioners complain about the use of these statistics, they submitted no evidence to the District Court to dispute their accuracy. App. 32-33. See Wygant, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment) (Plaintiffs in "reverse discrmination" suits continue to bear the ultimate burden of persuading the court that a public employer's evidence does not support an inference of prior discrimination and thus a remedial purpose for race-conscious action.)

307-308 (1977).[6/] In Croson, this Court rejected the city's proffered statistics because they did not demonstrate discriminatory exclusion with reference to the "relevant statistical pool" (i.e. minority businesses qualified to undertake the particular construction work). 488 U.S. at 501-502. The court below, however, found that the Consent Decree makes an appropriate comparison under Croson, as it "compares the number of black sergeants, not with the Boston

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6/ For example, with reference to minority membership in contractors' associations, the Court stated in Croson: "If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." 488 U.S. at 503.

population in general, but with those police officers with the minimal qualifications needed to become sergeants." 951 F.2d at 451. App. 20.

Petitioners also object to the Court of Appeals' consideration of a related case, Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972), which is referred to in the Consent Decree. In Castro, the Boston Police Department and the state Civil Service Commission were found to have engaged in unintentional discrimination against black and Spanish-surnamed applicants in hiring for entry level police positions. It was not improper for the Court of Appeals to consider this finding in assessing whether there was, in the MAAP case, a "strong basis in evidence" for

race-conscious relief respecting police promotions. Remedial action at the promotional level can be warranted where an employer has been found to have discriminated in entry level hiring. See U.S. v. Paradise, 480 U.S. at 168 (plurality) ("Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by non-minorities.")

II. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW RESPECTING CONSTRUCTION OF CONSENT DECREES.

In their effort to present a question worthy of this Court's review, petitioners have mischaracterized the Court of Appeals' treatment of the Consent Decree entered in the MAAP case. Petitioners incorrectly contend that the Court of Appeals "modified" and

"reconstructed" the Consent Decree (Pet. 14, 17), and "re-litigated" the allegations of discrimination made in the MAAP case. (Pet. 10, 12). As is apparent from its decision, the Court of Appeals did none of these things.

In assessing whether there existed a "strong basis in evidence" for the District Court's conclusion that the race-conscious relief appearing in the Consent Decree was warranted, the Court of Appeals considered the factual material set forth by the parties in the Consent Decree to describe the circumstances surrounding the entry of the Decree. 951 F.2d at 450-453. (App. 15-29).[7/] In doing so, the Court of

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7/ The Consent Decree was submitted to the District Court by the petitioners in support of their motion for summary judgment. App. 33; R.A. 42.

Appeals determined that the disclaimer of l bility in the Decree did not bar consideration of this information. 951 F.2d at 453. (App. 24-32). Contrary to petitioners' suggestion, the Court of Appeals did not "modify" the MAAP Consent Decree, or "relitigate" any issue in the MAAP case, when it construed the disclaimer provision for purposes of considering evidence in the present case.

As such, petitioners are wrong to contend that the decision below is inconsistent with Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). In Stotts, this Court held that the trial court could not, under the authority of a pre-existing consent

decree, issue an injunction which provided for equitable relief not authorized or envisioned in the consent decree, where certain parties to the decree objected to such relief. Id. at 572-583. In the present case, the District Court did not issue an injunction or any other order which enforced or modified the MAAP consent decree. Rather, both the District Court and the Court of Appeals simply considered certain factual material contained in the Consent Decree as part of their assessment of the petitioners' collateral attack on the Decree.

Petitioners complain that the Court of Appeals should have construed the disclaimer of liability provision in the Consent Decree differently, to preclude consideration of all such factual

material. In this regard, petitioners merely challenge the Court of Appeals' interpretation of a particular provision in this particular consent decree, without any showing that this issue applies to other cases. Petitioners also do not contend that a conflict exists among the courts of appeals in this regard.[8/]

In any event, the Court of Appeals was clearly correct in holding that the disclaimer of liability in the Consent Decree, under which the parties to the MAAP case settled the litigation without

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8/ Indeed, on this issue the decision below expressly follows the consistent treatment which other courts of appeals and district courts have given disclaimers of liability in consent decrees. See cases cited at 951 F.2d at 453. (App. 31-32). The cases cited by the Court of Appeals are only "roughly comparable", id., in view of the uniqueness of each disclaimer provision and each consent decree.

the entry of judicial findings of fact, does not preclude consideration in collateral proceedings of facts to which the parties agreed in the Decree. In her concurring opinion in Wygant v. Jackson Board of Education, 476 U.S. at 289-290, Justice O'Connor addressed this issue as follows:

> I . . . agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan. . . . The imposition of [such a] requirement . . . would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.

Justice O'Connor further noted that this view is consistent with this Court's previous decisions "recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the

absence of a specific finding of past discrimination," citing e.g. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-166 (1977) (reapportionment) and McDaniel v. Barresi, 402 U.S. 39 (1971) (school desegregation). Id. at 291. Cf. United Steel Workers of America v. Weber, 443 U.S. 193 (1979) (approving voluntary affirmative action plan implemented by private employer to correct apparent violation of Title VII).

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE RACE-CONSCIOUS RELIEF TO WHICH THE PETITIONERS OBJECT IS NO LONGER OPERATIVE UNDER THE CONSENT DECREE.

On April 10, 1992, the Department promoted eighty-five officers to the rank of sergeant, including fifteen black officers. With these promotions, the Department has achieved the Decree's

goal of forty black sergeants. See App. 47. Pursuant to an amendment to the Consent Decree approved by the District Court on December 3, 1991, once the complement of black sergeants in the Department reaches forty, "the Decree's affirmative action goals and timetables thereupon will expire."[9/]

Because the race-based preference which petitioners challenge in this case is no longer operative, there is no continuing significance to the issues they raise. Neither the petitioners nor other non-minority Boston Police officers will in the future be impacted by the Consent Decree in the manner

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9/ Pursuant to the same amendment, the remaining provisions of the Consent Decree, including, inter alia, those which concern validation of the sergeants promotional examination, continue in effect until a date certain following the next examination.

alleged by petitioners in this case. Thus, no "special and important" reason exists to grant the petition. Supreme Court Rule 10. See Rice v. Sioux City Cemetery, 349 U.S. 70, 73-80 (1955) (writ of certiorari dismissed as improvidently granted where subsequently enacted statute barred question from arising again, even though petitioner's individual claim was unaffected).[10/]

10/ The petitioners' claims in this case may not technically be moot, in that petitioners seek an injunction requiring that they be promoted to sergeant with their seniority and compensation determined retroactively to the dates upon which they were "passed over" as a result of the Consent Decree. Cf. Stotts, 467 U.S. at 571-572 (where employees who were laid off pursuant to injunction had been rehired, case challenging injunction not moot where claims for back pay and restoration of seniority remained). This Court need not, however, consider the potentially difficult question of mootness at the certiorari stage, as this case is otherwise unworthy of review for all the reasons discussed above.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

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Dated: April 27, 1992

APR 27 1992
OFFICE OF THE CLERK

(3)

No. 91-1516

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANNE G. STUART, ET AL.,
PETITIONERS,
v.
FRANCIS M. ROACHE, AS HE IS POLICE
COMMISSIONER OF
THE CITY OF BOSTON, ET AL.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF OF RESPONDENT MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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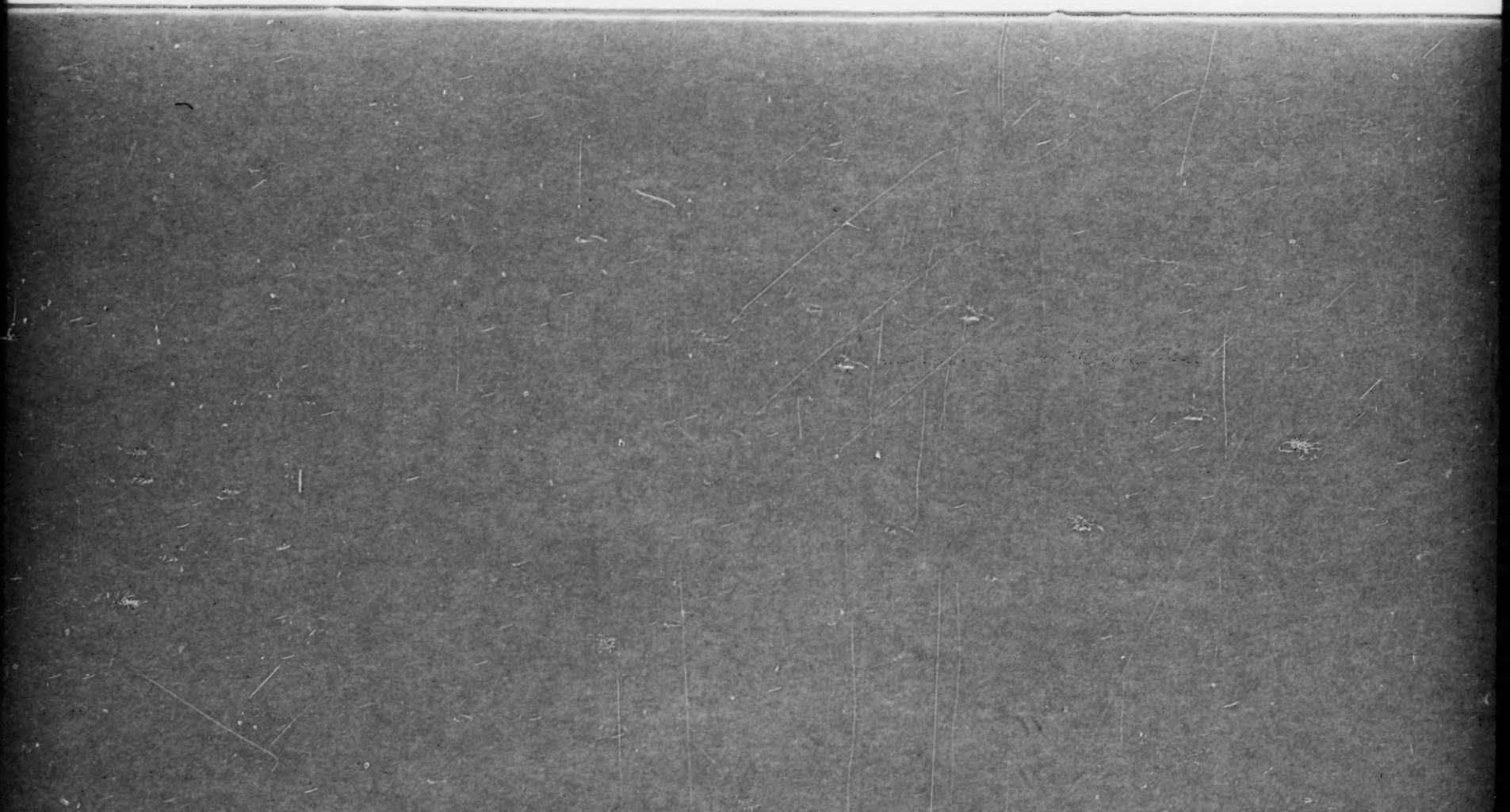

QUESTIONS PRESENTED

1. Whether certiorari should be granted to decide whether a disclaimer of liability contained in a consent decree precluded the lower courts from relying upon statistical and anecdotal evidence also contained in the decree in upholding the decree's affirmative action provisions, which since have expired.

2. Whether certiorari should be granted to decide whether the lower courts properly upheld a consent decree's affirmative action provisions, based upon findings that: (a) a historical racial imbalance between the eligible applicant pool and the public employer's work force provided a firm basis in evidence for believing that remedial action was needed; and (b) the affirmative action provisions, which since have expired, were narrowly tailored to serve their remedial purpose.

3. Whether as an alternative basis for affirming the judgment below, the affirmative action provisions formerly contained in the consent decree and authorized by Title VII should be scrutinized under a deferential standard which inquires only whether the objectives of the decree are within the powers of Congress and whether the limited use of racial criteria to achieve the decree's goals is permissible.

4. Whether, as an alternative basis for affirming the judgment below, the Thirteenth Amendment to the United States Constitution provided independent, constitutional authority for the consent decree's former use of affirmative action to remedy manifest racial imbalances in a public employer's workforce and to eliminate the adverse impact of the public employer's prior promotional practices.

LIST OF THE PARTIES

The petitioner failed to include in its list of the parties Respondent-Intervenor Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO"). MAMLEO is a corporation organized under the laws of Massachusetts. It has no parent companies, subsidiaries or affiliates.

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CONSTITUTIONAL PROVISIONS

In addition to the constitutional provisions listed in the petition, this case involves the Thirteenth Amendment to the United States Constitution, which provides:

> Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

MAMLEO incorporates by reference the statement of facts contained in the decision of the First Circuit of Appeals, reported at Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) and reprinted at pages 1 - 47 of the Appendix to the Petition.

Since the Court of Appeals decision was rendered, 16 additional promotions of black sergeants have been made by the respondent Boston Police Department. As a result, the affirmative action provisions of the decree have expired. Absent any further order of the District Court, therefore, the decree no longer provides for race conscious relief.

REASONS FOR DENYING WRIT

A. Petitioners Seek Certiorari to Review Their Unique Interpretation of the Particular Language of the Consent Decree's Disclaimer of Liability.

Reduced to essentials, petitioners seek review of what they contend is an erroneous interpretation of the particular language contained in the disclaimer of liability found in the consent decree at issue. No important legal questions of general applicability are raised. No conflict between decisions of other Circuit Courts of Appeals is implicated. No decision of this Court is contrary to the First Circuit's construction of the language employed in the disclaimer. Because the petition centers upon an analysis of the particular facts involved and upon the construction of the specific language of the decree, certiorari is not warranted. See generally United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) ("a

court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

In addition to its narrow and isolated focus, petitioners' argument based upon the disclaimer of liability contained in the decree is, on its merits, fatally flawed. The consent decree in this case, as is typical, contained a disclaimer of liability. Petitioner's Appendix ("App.") at 77-78. The salutory purpose of such disclaimers is well known. "The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentives to meet voluntarily their civil rights obligations." Wygant v. Jackson Board of Education, 470 U.S. 267, 290 (1986) (O'Connor, J., concurring). See also United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979); id. at 210 (Blackmun, J., concurring) (upholding voluntary

affirmative action plan under Title VII despite employer's denial of wrongdoing); Firefighters v. Cleveland, 478 U.S. 501, 523-24 n.13 (1986) ("'A consent decree has several other advantages as a means of settling litigation. It is easier to obtain enforcement of a consent decree because it will be unnecessary to prove many facts that would otherwise have to be shown in order to establish the validity of an ordinary contract.'") (citations omitted); id. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); Johnson v. Transportation Agency, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring) ("Thus, I concluded in Wygant that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination."); United States v. Armour, 402 U.S. 673, 681-82 (1981) ("In a consent decree the parties waive their right

to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable work of litigation.").

Thus, the disclaimer permitted the defendants to settle the case and undertake voluntary efforts to remedy the effects of their prior conduct without exposing themselves to indeterminable liability to third parties. That is not to say, however, that the disclaimer somehow invalidated all of the remaining, carefully negotiated terms of the decree that provided the basis for the settlement itself. Nor, for that matter, did the disclaimer rebut the allegations of the MAAAP plaintiffs' verified complaint or dissolve the admissions to particular facts established by the MAAAP defendants' answers (admissions wholly ignored by the petitioners' citation to the affirmative defenses alleged in the MAAAP defendants' answers. Petition at 13 & n.4).

In that regard, as the Court of Appeals found, the consent decree "recites figures that would appear to make out a

'prima facie' case of unlawful discrimination in the promotion of black officers by the Boston Police Department." Stuart, 951 F.2d at 450. Petitioners made no effort to rebut these statistics, despite their opportunity to do so. 951 F.2d at 453.

As the Court of Appeals noted, the decree also refers to a previously litigated case in which the same public employer was found to have discriminated against black applicants in its entry level hiring practices, a finding that has an obvious and direct effect on the promotional ranks at issue in this case. Id. See also Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). The petitioners' contention that the Court of Appeals went beyond the four corners of the decree to rely on the Castro case therefore is erroneous, as is their claim that the entry level discrimination found in Castro is unrelated to the discrimination in the promotional ranks addressed by the decree. Similarly, petitioners ignore that the MAAAP plaintiffs' verified complaint demonstrated the discriminatory effects of the defendants' prior

promotional tests on black officers who in fact took those exams. Stuart, 951 F.2d at 451.

Rather than attempting to rebut the facts and inferences naturally drawn from the decree and the MAAAP pleadings, the petitioners chose to rest their evidentiary case on the tortured proposition that the disclaimer of liability rendered the factual data contained in the decree meaningless surplusage and, further, forever precluded judicial inquiry into whether the decree's affirmative action provisions had a sufficient evidentiary basis. Apart from twisting the purpose of the disclaimer beyond recognition, the short answer to petitioners' argument is that, in the words of the Court of Appeals, "that is not what the disclaimer says." 951 F.2d at 453.

> The disclaimer simply precludes the decree's use an "admission" of liability, or as an "admission" of the facts and violations mentioned in the complaint. . . It does not say that it applies to facts agreed to in the decree itself. Nor does it say that the Department may not subsequently admit to the same facts for other purposes (which they have done in the case before us).

951 F.2d at 453 (emphasis in original).

At bottom, petitioners argue that the Court of Appeals somehow modified the decree by considering the facts recited in the decree as support for the relief entered therein. It is a perverse rule of construction, however, that postulates that enforcing explicit language found in a written instrument constitutes a modification of its terms. Firefighters v. Stotts, 467 U.S. 561 (1984), cited by petitioners, offers no support for such a position. Indeed, to the extent that Stotts requires the scope of a consent decree to be discerned within its four corners, id. at 574, the decision squarely supports the Court of Appeals' construction of the explicit language of the decree.

In sum, the petitioners' reliance upon the disclaimer in the decree renders the issue raised herein exceedingly narrow and of little, if any, significance to other litigants. For that reason, and because the construction given to the disclaimer by the District Court and the Court of Appeals clearly is correct, certiorari should be denied.

B. The Court of Appeals Properly Applied the Principles of this Court's Decision in Richmond v. J.A. Croson Co.

The Court of Appeals properly applied the principles set forth in this Court's decision in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and found that the decree's affirmative action provisions survived strict scrutiny.

An examination of the petition herein reveals that petitioners' true complaint is not that the Court of Appeals failed to apply the principles established in Croson but that, in their view, an erroneous decision was reached. A perceived error in the judgment reached below, however, is not sufficient by itself to warrant certiorari review. Ross v. Moffitt, 417 U.S. 600,

616-17 (1974). Moreover, the errors perceived by petitioners in the outcome below reflect their own misunderstanding of Croson and other decisions of this Court, and therefore do not warrant certiorari review.

Petitioners mistakenly assert that statistical evidence of a racial disparity in an employer's work force, even when properly marshalled, is insufficient to state a prime facie case of discrimination. Petition at 20. The Court recently, and repeatedly, has held to the contrary. See Wards Cove Packing Co. v. San Antonio, 490 U.S. 642, 650 (1989) ("statistical proof can alone make out a prima facie case"); Croson, 448 U.S. at 501 ("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII.") (emphasis added) (citation omitted); Wygant, 476 U.S. at 292 (O'Connor, J., concurring) ("For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of

qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the school board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." See also Johnson, 480 U.S. 631-37; Hazelwood School District v. United States, 433 U.S. 299, 307-09 (1977).

Nor, contrary to the views advanced by the petitioners, is it necessary for a court to make findings of discrimination in order to justify an affirmative action plan. Petition at 21. Croson, 448 U.S. at 500 (test is whether a "'strong basis in evidence'" exists for conclusion that remedial action is necessary) (citations omitted); Wygant, 476 U.S. at 289 (O'Connor, J., concurring) ("[I] agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an

affirmative action plan."). The Court of Appeal's conclusion that findings of discrimination were not required was consistent with decisions of this Court and with a prior Court of Appeals decision involving a similar challenge to the consent decree at issue here and in which certiorari also was denied. See Massachusetts Association of Afro-American Police v. The Boston Police Department, 780 F.2d 5 (1st Cir. 1985), cert. denied, Burke v. Massachusetts Association of Afro-American Police, 478 U.S. 1020 (1986).

Petitioners also mischaracterize the Court of Appeals' decision as being based merely upon a finding that the statistical evidence "cas[ts] doubt on the fairness of the promotion process." Petition at 20, 22. To the contrary, the Court of Appeals found that the evidence -- unrebutted by petitioners -- seemed to make out a prima facie disparate impact case. Stuart, 951 F.2d at 450. In addition to such statistical evidence, the Court found a firm basis for remedial relief in the discriminatory results of prior promotional tests employed by the Police

Department and the prior findings of entry level discrimination by the Department. 951 F.2d at 450-52.

Moreover, the Court of Appeals was careful to ensure that the consent decree did not suffer from the defects identified in cases such as Croson and Wygant where the statistical evidence did not compare the racial composition of the job population to that of the relevant qualified applicant pool. 951 F.2d at 450-51. The Court painstakingly reviewed the statistics to determine that the decree "compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants." 951 F.2d at 451.

In sum, the Court of Appeals strictly adhered to the holding in Croson in finding that a firm basis in evidence existed for the conclusion that the affirmative action provisions of the decree were necessary. 951 F.2d at 449-452.

The Court of Appeals also adhered to the teachings of Croson in concluding that the decree was narrowly tailored to

accomplish its goals. As noted above, after the Court of Appeals' decision was rendered and, indeed, after the petition was filed, the affirmative action provisions of the decree expired as a result of promotions made by the Boston Police Department in April of 1992. The decree thus is anything but "self-perpetuat[ing] and self-modifying" as alleged by the petitioners. Petition at 23.

Several other features of the decree also justified the Court of Appeals' conclusion that it was sufficiently narrowly tailored. For example, the decree never provided for mandatory quotas. To the contrary, the Police Department's obligation was "to make a good faith effort" to reach its goals. The goals were set in anticipation of having a sufficient number of Black officers eligible to be promoted as a result of validated tests. Only those Black officers who passed a validated exam were eligible for promotion. No Black officer received an absolute entitlement to promotion under the decree. No white officer automatically was excluded from promotion as a result of its

terms. App. 95-96. The decree thus did not unsettle any legitimate, firmly rooted expectation on the part of white officers. Stuart, 951 F.2d at 454. See generally Johnson, 480 U.S. at 638.

No officer ever was discharged, demoted, or suffered any loss of salary or benefits as a result of the decree. Weber, 443 at 208. Compare Wygant, 476 U.S. at 282-83. ("Denial of a future employment opportunity is not as intrusive as loss of any existing job.") The goals and timetables were designed to eliminate a manifest racial imbalance, not to maintain a racially balanced work force. Weber, 443 U.S. at 208. Johnson, 480 U.S. at 616. The updating of the goals and timetables in 1990 to reflect the current racial composition of the Department's work force further prevented the maintenance of any rigid quota system. Stuart, 951 F.2d at 454-55.

As the Court of Appeals found, the petitioners' further claim that the Police Department did not consider alternatives to affirmative action also is misplaced. The decree described the

inadequacies of previous efforts to reform the promotional system, expressly took into account the "need for prompt elimination of adverse impact or disparate treatment," and concluded that affirmative measures to promote more Blacks to supervisory positions were needed "in order to prevent the disparity between the percentage of Black supervisors and the percentage of Blacks eligible for promotion to supervisor from growing, and in order to reduce that disparity...." App. at 93-96.

In sum, the Court of Appeals properly adhered to Croson's strict scrutiny standard in reviewing the affirmative action components of the decree. Moreover, even if certiorari properly could be granted to correct erroneous conclusions reached in applying proper standards of review to the facts of a particular case, there was no error here and certiorari therefore should be denied.

C. Alternative Grounds Exist on which the Court of Appeals' Judgment Upholding the Consent Decree Can Be Affirmed.

Although not relied upon by the Court of Appeals, there exist alternative grounds asserted below by MAMLEO on which the judgment of the Court of Appeals can be affirmed. See generally Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U.S. 479, 481 (1976) (court can find another ground for affirmance not relied upon by lower court).

1. The Consent Decree Is a Valid Exercise of Power Granted Pursuant to Title VII and Section 5 of the Fourteenth Amendment.

Congress possesses broad remedial powers under 5 of the Fourteenth Amendment to eradicate the effects of prior discrimination, Fullilove v. Klutznik, 448 U.S. 483 (1980); Croson, 488 U.S. at 487-89. In Fullilove, for example, this Court upheld a minority set aside program adopted by Congress and, in so doing, employed a deferential standard of review which inquired only whether the objectives of the legislation were within the power of Congress and whether the limited use

of racial and ethnic criterion was a permissible means to achieve Congress' objectives. 448 U.S. at 473. See also Croson, 488 U.S. at 487.

A similarly deferential standard of review should be applied in this case, where the power of a public employer and the District Court to implement the Congressional objectives of Title VII through the entry of a consent decree is at issue. See generally Sheet Metal Workers v. EEOC, 478 U.S. 421, 428 (1986) ("In order to foster equal employment opportunities, Congress gave the lower courts broad power under 706(g) to fashion 'the most complete relief possible' to remedy past discrimination.") (citation omitted). There is no question that Title VII permits voluntary affirmative action efforts undertaken without prior findings or admissions of discrimination in order to eliminate traditionally segregated job categories and delegates to the courts the power to enter such relief in the form of a consent decree. Weber, 443 U.S. at 197, 209; Hazelwood, 433 U.S. at 299; Firefighters, 478 U.S. 501. Congressional

authorization of such efforts through Title VII arises out of Congress' broad remedial powers under 5 of the Fourteenth Amendment. Just as eradicating the effects of prior discrimination clearly falls within the powers of Congress, Fullilove, 448 U.S. at 473, so too, the limited use of racial criterion contained in the decree is a permissible means for the Court to implement the objectives of Congress. Id. Should certiorari be granted, no more need be shown to uphold the validity of the consent decree under the Fullilove standard.

2. Race-Conscious Remedies Are Valid Under the Thirteenth Amendment.

"Wholly aside from the fourteenth amendment, the thirteenth amendment is an affirmative grant of power to eliminate slavery along with its badges and incidents and to establish universal civil freedom." Williams v. City of New Orleans, 729 F.2d 1554, 1557 (5th Cir. 1984) (Wisdom, J., concurring in part, dissenting in part). Thus, when a present discriminatory effect upon Blacks as a class is linked to a

discriminatory practice against Blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth Amendment. Id. See generally The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

In Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), this Court affirmed the power of Congress, based on the Thirteenth Amendment, to prohibit all racial discrimination in the sale and rental of property. Id. at 437-44. The Court held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440. Under the Jones v. Mayer rationale, current forms of racial discrimination and its effects are badges of slavery that may be proscribed under the Thirteenth Amendment if they are historically linked with slavery or involuntary servitude. In granting Congress the power to carry out its mandate, the Thirteenth Amendment thus grants the

power to eliminate practices that continue to burden Blacks with badges of inferiority.

> Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the thirteenth amendment.

L. Tribe, American Constitutional Law, 5-13 at 259 (1978).

Because the Thirteenth Amendment seeks to attain "universal civil freedom for Blacks as a race," The Civil Rights Cases, 109 U.S. at 20, remedial action must address the needs of Blacks as a race, and not be confined to identifiable victims. See generally Williams, 729 F.2d at 1580 (Wisdom, J., concurring in part, dissenting in part). The promotional goals established by the consent decree are an attempt to eliminate the badges and incidents of slavery reflected in the Police Department's past hiring practices and condemned by the Castro v. Beecher decision. The Thirteenth Amendment authorized Congress to delegate to the courts the power to enter such

affirmative action in the form of a consent decree regardless of whether prior findings or admissions of discrimination are made. The Thirteenth Amendment therefore provides an alternative basis to affirm the judgment of the Court of Appeals.

CONCLUSION

For each and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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